Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	
Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
Junk Fax Prevention Act of 2005	)	CG Docket No. 05-338
	)	
Petition for Expedited Declaratory Ruling of	)	
AmeriFactors Financial Group, LLC	)	

WHITE PAPER ON THE FIRST AMENDMENT AND THE FAX PROVISIONS OF THE TCPA

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TABLE OF CONTENTS

Page

SUMMARY 3

I. CHANGES IN TECHNOLOGY AND MARKET SHARE NECESSITATE A FRESH FIRST AMENDMENT REVIEW 7

A. Technological Changes 7

B. The Dominance of the Computer/Internet over the Fax Machine 11

C. Statistical Data Demonstrates the Rapid Decline of Faxing as a Major Form of Advertising 14

II. IN CONSIDERING THE CONSTITUTIONALITY OF THE TCPA FAX PROVISIONS, THE COMMISSION SHOULD CONSIDER THE CONSEQUENCES OF TREATING E-FAXES AS A VIOLATION UNDER A STRICT LIABILITY STANDARD 18

III. THE FIRST AMENDMENT AND COMMERCIAL SPEECH 25

IV. SECTION 227(B)(1)(C) OF THE TCPA (THE FAX PROVISION) IS SUBJECT TO STRICT SCRUTINY 28

V. EVEN UNDER THE CENTRAL HUDSON STANDARD, SECTION 227(B)(1)(C)'S APPLICATION TO E-FAXES WOULD VIOLATE THE FIRST AMENDMENT 33

A. There is no Substantial Government Interest Justifying the Application of the TCPA to E-faxes 39

1. E-faxes do not shift advertising costs as there is no automatic printing 42
2. E-faxes do not occupy a telephone line or fax machine preventing other messages from coming through 43
3. Time spent reviewing an e-fax does not justify the restriction on speech 45

B. Application of the TCPA to E-faxes does not Directly Advance any Asserted Interest 50

VI. CONCLUSION 57

INTRODUCTION

"Believe it or not, the fax machine is not yet extinct."[1] This was how then-Judge (now Justice) Kavanaugh began the seminal decision of *Bais Yaakov of Spring Valley v. FCC*. This sentiment is at the core of AmeriFactors' Petition to the Federal Communications Commission ("FCC" or the "Commission").[2] In the nearly three decades since the TCPA was enacted, the use of faxing has declined substantially and, equally importantly, fax technology has changed. For half a decade, the FCC has been tracking the decline of faxing, as evidenced by the reduction in junk fax complaints made to the agency. Fax complaints to the FCC are down more than ninety percent from the high levels reported in 2006 to 2009.[3] The FCC has explained that the "decline in fax complaints follows in lockstep with Americans' shift away from fax transmissions to other forms of document sharing via the Internet; some estimate that as few as 3 percent of American households have a device capable of receiving faxes."[4] Importantly, the FCC recognized that: "as Americans abandon landline telephone service for wireless-only

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1 *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1079 (D.C. Cir. 2017).

2 *See* AmeriFactors Financial Services, LLC, Petition for Expedited Declaratory Ruling, CG Docket Nos. 02-278 and 05-338 (filed July 13, 2017) (the "Petition").

3 *See* Federal Communications Commission, Enforcement Bureau, Report on Unsolicited Facsimile Advertisements 2 (May 2, 2018) ("2018 Unsolicited Fax Ads Report") (attached hereto as **Exhibit A**). Specifically, fax complaints fell to 3,214 junk fax complaints from May 1, 2017 through April 30, 2018. This compares to 61,126 complaints from July 9, 2007 to July 8, 2008. Appendix, Feb. 5, 2010 Report. The 2006-2007 complaints were less than 5% of the 2007-2008 number. *Id.*

4 *Id.*

service, consumer use of fax machines will probably continue to decline."[5] In *Faxed*: *The Rise and Fall of the Fax Machine* (2015), Dr. Jonathan Coopersmith observed that in the late 1990's and early 2000's faxing largely disappeared or metamorphosed "into the far more obnoxious, but less costly email spam."[6] He emphasized, "Although it took longer than anticipated, faxing lost out to email when email became easier to use and less expensive than faxing."[7] Faxing "lost its primary and its independent existence to digital communications in the form of the internet, Worldwide Web, PDF, cell phones and other technologies."[8] These other technologies created a cumulative advantage in that they were generally tied to the internet and the computer, creating an even greater disadvantage for fax technology. In the end, fax technology was ultimately "succeeded by technologies that provided better services more easily, and cheaply, and with higher quality."[9]

Even within transmissions that, in part, use facsimile protocols, messages are no longer received only by stand-alone fax machines that indiscriminately print every message received. Instead, in recent years, facsimile messages are received in a variety of ways, including as an attachment to an e-mail. These innovations have largely rendered "faxing" an

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5 *See* 2018 Unsolicited Fax Ads Report. Additionally, this fact matters because the prohibition on unsolicited fax advertisements is restricted to communications through a regular telephone line. *See* 47 U.S.C. §227(a)(3).

6 Jonathan Coopersmith, *Faxed*: *The Rise and Fall of the Fax Machine* (Johns Hopkins University Press, 2015), 180 ("FAXED").

7 *Id.* at 205.

8 *Id.* at 2.

9 *Id.*

anachronism, a term that – like "dialing" a telephone number – has outlived the technological underpinnings that led to its use.

As AmeriFactors explained in the Petition, these changes require the Commission to revisit the scope of the definition of a "telephone facsimile machine" in the Telephone Consumer Protection Act ("TCPA").[10] Any attempt to apply the TCPA to facsimile messages that are received by an online fax service[11] is an improper attempt to make a square peg fit into a round hole. Furthermore, as this paper addresses, the Commission's choice has implications beyond the strict statutory interpretation question. There is no government interest, compelling or otherwise, that would justify the application of the TCPA to facsimile messages that are not received on a traditional "telephone facsimile machine" and/or that cause none of the harms the TCPA was intended to prevent. As a result, if the FCC were to apply the TCPA fax provisions to the new modern reality of fax transmissions, when the original justifications for the law are no longer there, such an interpretation would run a significant risk of violating the First Amendment to the United States Constitution.

SUMMARY

In 1991 when the TCPA was first enacted, the justification offered for the restrictions on speech that would necessarily follow was the need to prevent the shifting of advertising costs from the sender to the recipient. With the fax technology at the time, facsimile messages were received by a stand-alone fax machine. These machines connected to regular

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10 47 U.S.C. § 227 *et seq*.

11 Throughout this paper "e-fax" and "facsimile sent to an online fax server" are used interchangeably.

telephone lines –[12] either dedicated to the sending and receipt of faxes or shared with a voice line – and automatically printed every fax received. Moreover, the machines had limited transmission speeds, which generally required a minute or more to receive a single facsimile page. And, in 1991, an unsolicited (or solicited) facsimile might tie up a telephone line or occupy a fax machine.[13] Thus, the statute made it unlawful "to use any telephone facsimile machine, computer, or other device to send, ***to a telephone facsimile machine***, an unsolicited advertisement."[14]

The Commission in its pronouncements in 2003[15] and 2015[16] appeared to stretch the clear and unambiguous definition of a "telephone facsimile machine" to an illogical conclusion and found that facsimile messages that are received on fax servers and computers are

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12 47 U.S.C. § 227(a)(3). Although there is no statutory definition for "regular telephone lines" it likely refers to the predominant type of line used in 1991, a copper analog line. Today, digital lines dominate. These lines can transmit many more signals thus reducing the risk of interference. The exclusion of computers from the receiving end, along with the **restriction** of the fax provisions of the TCPA demonstrates a clear congressional intention to exempt communications received by a computer. Significantly, the statutory restriction to "regular telephone line" in § 227(a)(3) applies only to faxes. *Compare* 47 U.S.C. § 227(b)(1)(B) ("any residential telephone line") *and* § 227(b)(1)(A)(i)-(iii).

13 The concern of tying up a telephone lines or fax machines was usually expressed in terms of constituting a burden on interstate commerce.

14 47 U.S.C. § 227(b)(1)(C) (emphasis added).

15 *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14133, ¶ 200 (2003) ("*2003 TCPA Report and Order"*).

16 *Westfax, Inc. Petition for Consideration and Clarification,* Declaratory Ruling, 30 FCC Rcd 8620, 8623, ¶ 10 (C.G.B. 2015) ("*Westfax Order"*).

also prohibited under the TCPA. The basis for this conclusion essentially is that computers have the "capacity" to transcribe text or images to paper, ***if connected to a printer*;** therefore, they too are "telephone facsimile machines" under the TCPA.[17] Such a decision however ignores the clear dichotomy between the first and second clause of the TCPA – one in which a "computer" is listed and one in which "computer" is omitted. It further ignores the fact that a computer is not a "telephone facsimile machine" simply because it has the "potential" to be connected to a printer.

Beyond the fact that this interpretation of the TCPA fax provision as applied to e-faxes goes beyond the statutory language, the interpretation is in dangerous constitutional territory. The TCPA was generally found to be constitutional after its enactment despite its restriction on speech because of the harms that resulted from the transmission of a facsimile message to a traditional facsimile machine (i.e. indiscriminate printing causing loss of paper and toner). When the conventional facsimile machine is taken out of the equation, however, the harms that justified the speech restriction are no longer there and the TCPA no longer has a constitutional leg to stand on. While there may have been a compelling or substantial governmental interest in 1991 justifying the restriction on speech, now in 2019, the harm incurred from receiving an e-fax is the same as receiving an e-mail, or for that matter "junk mail." Yet, in one scenario the sender is subject to ruinous class actions and in the other he is not exposed to any private suit.[18]

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17 *2003 TCPA Report and Order*, ¶¶ 198-202.

18 *See* 15 U.S.C. § 7701 *et seq.*

In this submission, AmeriFactors supports its Petition by explaining the First Amendment implications that would be raised were the FCC to apply the TCPA to e-faxes and facsimile messages received by a cloud-based fax server or computer. AmeriFactors' concerns focus on Commission policies that would treat e-faxes and other similar communications as subject to substantial liability under the TCPA when they are in form and substance indistinguishable from e-mail messages, which is subject to very different potential liability. Any such Commission interpretation would expose the TCPA fax provisions to a successful attack on constitutional grounds based on the First Amendment either under the emerging strict scrutiny standard adopted by the Supreme Court in *Reed v. Town of Gilbert*[19] for content based restrictions, or the *Central Hudson*[20] intermediate standard that the Commission has applied in the past to analyze TCPA policies.

AmeriFactors is not seeking invalidation of the TCPA under the First Amendment of the Constitution. Rather, the FCC has a responsibility to "construe [the] statute where fairly possible to avoid substantial constitutional questions and not to impute to Congress an intent to pass legislation that is inconsistent with the Constitution as construed by the [Supreme Court]."[21] While courts have sometimes brushed aside the draconian penalties of the TCPA, stating that

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19 __ U.S. __, 135 S.Ct. 2218, 2226 (2015).

20 *Central Hudson Gas & Electric Corp. v. Public Service Commission New York*, 447 U.S. 557, 564 (1980).

21 *Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, 62 Fed. Reg. 16,093, 16,095 (1997) (internal quotation marks omitted) ("Alarm Monitoring Interpretation").

they must "enforce the law as Congress enacted it,"[22] the law that the courts enforce is not only based on how Congress wrote the law, but how the FCC interprets the law. The FCC has a duty to make sure its policies do not go beyond the parameters of the Constitution. The Commission must act within its statutory language and avoid imposing huge costs on a no-fault basis when the technology used strays from the underpinnings of the statute. It can do so here by ruling that the TCPA does not reach e-faxes and facsimile messages received by a cloud-based fax server or computer.

I. CHANGES IN TECHNOLOGY AND MARKET SHARE NECESSITATE A FRESH FIRST AMENDMENT REVIEW

A. Technological Changes

In the first dozen years of the TCPA, the law was challenged on first amendment grounds numerous times, unsuccessfully.[23] Yet, that does not mean the inquiry is over. As demonstrated by those decisions, the justification offered to support the constitutionality of the TCPA was based on the needs asserted in 1991 when the Act was passed and the assumption that all facsimiles are received on a stand-alone facsimile machine that automatically prints incoming faxes. The Commission, as the enforcer of the TCPA and interpreter of the law under the Hobbs

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22 *Bridgeview Health Care Center, Ltd. v. Clarke*, 816 F.3d 935, 941 (7th Cir. 2016).

23 *Destination Ventures, Ltd, v. FCC*, 46 F.3d 54 (9th Cir. 1995); *Missouri ex rel Nixon v. American Blast Fax, Inc.*, 323 F.3d 649, 654-55 (8th Cir. 2003); *Texas v. American Blastfax, Inc.*, 121 F. Supp. 2d 1085, 1092 (W.D. Tx. 2000); *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1169 (S.D. Ind. 1997). Constitutional challenges are fact specific affirmative defenses. *Vasquez v. Triad Media Solutions, Inc.*, Case No.: 15-cv-07220, 2016 WL 155044 (D.N.J. Jan. 13, 2011).

Act,[24] has a particularly heightened duty to closely consider constitutional issues that may be affected by its decisions regarding the interpretation of the TCPA. This is especially true when confronted by the rapidly changing technology associated with how faxes are sent and received, and its radically diminished use.[25]

At the outset, we recognize the general principle that administrative agencies should presume a statute that the agency must enforce to be constitutional.[26] To its credit, the FCC has generally considered constitutional considerations as it promulgated rules, orders, and guidance to the public regarding the limits of statutes under its purview.[27] For example, in *Agape Church, Inc. v. FCC*, then-Judge Kavanaugh in his concurring opinion applauded the FCC for recognizing the changes in marketplace which in effect undermined the constitutional foundation of a previous rule.[28] There, then-Judge Kavanaugh recognized that "[t]hings have changed [ ] [i]n the two decades since Congress enacted the Cable Act of 1992 [and] cable

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24 28 U.S.C. § 2342.

25 *See infra* pp. 10-16.

26 *See* Alarm Monitoring Interpretation, 62 Fed. Reg. at 16,095. ("Although decisions about the constitutionality of congressional enactments are generally outside the jurisdiction of administrative agencies, we have an obligation under Supreme Court precedent to construe a statute where fairly possible to avoid substantial constitutional questions and not to impute to Congress an intent to pass legislation that is inconsistent with the Constitution as construed by the [Supreme Court]." (internal quotation marks omitted)).

27 *In the Matter of Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, 27 FCC Rcd. 6529, 6537 (2012) (citing *Frisby v. Schultz*, 487 U.S. 474, 483 (1988)).

28 738 F.3d 397, 413 (D.C. Cir. 2013) (Kavanaugh, J., concurring).

regulations adopted in the era of *Cheers* and *The Cosby Show* are ill-suited to a marketplace populated by *Homeland* and *House of Cards.*"[29] Then-Judge Kavanaugh thus stated:

> the constitutional problems infecting the 1992 Cable Act's various program carriage and non-discrimination requirements grow more significant every day, as new video programming distributors emerge and prosper. The upshot is that the cable 'bottleneck monopoly' on which Turner rested no longer exists – and, as a result, the Act's infringements on cable operators' editorial discretion no longer can withstand First Amendment scrutiny. [30]

The FCC should undertake the same rigorous analysis it applied to the issue of the "viewability rule" to determine whether in today's modern age, an interpretation of the TCPA that includes facsimiles received on a computer can withstand constitutional muster.

The Supreme Court has made it clear that when fundamental interests are at stake – whether they be free speech or federalism – the constitutionality of the challenged act must be determined in context of the circumstances at the time of challenge. Perhaps one of the most notable examples is the Supreme Court decision in *Shelby County, Alabama v. Holder,* where a county in Alabama challenged the Voting Rights Act's coverage formula and preclearance requirement as unconstitutional.[31] In his opinion, Chief Justice Roberts found that there was no dispute over the original justification of the preclearance requirements and emphasized that "the Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem…" Nevertheless, Justice Roberts found that the question at issue was

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29 *Id.*

30 *Id.* at 414.

31 570 U.S. 529 (2013).

whether the Act's extraordinary measures *continue* to satisfy constitutional requirements.[32] In its analysis, the Supreme Court found that nearly 50 years after the Voting Rights Act passed, "things have changed dramatically."[33] The Court further noted that in the most recent reauthorization of the Voting Rights Act in 2006, Congress did not use the current record to shape a coverage formula "grounded in current conditions" but rather "reenacted a formula based on 40-year-old facts having no logical relation to the present day."[34] The Court further found that there was "no valid reason" to insulate review of the challenged formula "because it was previously enacted 40 years ago."[35] Ultimately, the Supreme Court struck down the coverage formula authorized in the 2006 reenactment of the Voting Rights Act as it was not based on current conditions and directed that Congress "may draft another formula based on current conditions."[36]

The *Shelby County* case dealt with institutionalized racism that had persisted for more than a hundred years after the end of the Civil War. Both the majority and dissenting opinions recognized the extraordinary, persistent discrimination which had been in effect institutionalized. Yet, recognizing these facts, the Supreme Court found that the need for the

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32 *Id.* at 536.

33 *Id.* at 547.

34 *Id.* at 554.

35 *Id.* at 556.

36 *Id.* at 557.

Voting Rights Act had to be measured at the time of re-enactment to support the basis for the constitutionality of the Act.

The constitutionality of the TCPA's fax provisions will also turn on the *current* technology being used and whether the need or justification for the Act is still sufficient in light of the current technology and the importance of controlling fax advertising when this medium continues to diminish in significance. The question posed by any constitutional challenge will turn on whether the harms caused by an e-fax are the same or similar as those harms the TCPA was meant to address.

The Commission has consistently recognized its responsibility to consider changes in market structure, growth, and the absence of communication practices, and the most dynamic of all characterizations of its legislative responsibilities – rapid technological changes. Common experience establishes that any comparison between social attitudes that were at issue in the *Shelby County* case change at a glacial pace compared to innovation and adoption of new technology, as well as fundamental changes in those markets.

B. The Dominance of the Computer/Internet over the Fax Machine

There are few fields of human endeavor that have changed more rapidly and profoundly than communications in the last 40 years, particularly fax technology and computer/ internet technology.[37] In 1991, when the TCPA was enacted, faxing technology for commercial reasons was a rapidly expanding dynamo which presented a threat to interstate commerce by tying up the recipient's fax machine and telephone line. The primary justification for the fax

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37 *See generally* FAXED, 144-214.

provision of the TCPA was shifting cost of advertising to the recipient who had not consented. It was not until 1993 that Adobe began to market "PDF" technology that suddenly allowed computers to scan documents and send copies of original documents electronically.[38] Also in 1993, Faxing Over Internet Protocol (FoIP) was introduced, which allowed major reductions in long distance costs and greater control over outgoing faxes.[39] However, the most serious form of internet competition did not occur until February 1999 when the "e-fax" companies began aggressive marketing.[40] The e-fax business grew exponentially. Professor Coopersmith noted that j2 Global Communications (the market leader) "grew from 27,000 subscribers and $3.5 million in revenue in 1998 to 4.0 million subscribers (200,000 paying) and $48 million in 2002, then to 13.1 million subscribers (1.9 million paying) and $255 million in 2010."[41] Figures for today's market are not publicly available, but e-faxing technology remains a significant industry component.

Separate from stand-alone faxing, in 1991, the growth of the personal computer was at an exponential rate. The first personal computers were available in 1981, and by 1991 (the time of the enactment of the TCPA) there were 130 million personal computers worldwide.[42] By 2004, there were 775 million computers worldwide.[43] As the Commission

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38 *See FAXED,* 196.

39 *Id.* at 189-190.

40 *Id.* at 197.

41 *Id.* at 193, n. 70.

42 *See* FAXED, 197.

recognized in its reports to Congress, the rise of computers enabled users to shift from traditional faxing to other means of document sharing, including the Internet (*i.e.*, cloud-based e-fax services).[44]

Courts have recognized the fax machine's rapidly diminishing relevance because of the combination of computers, the internet, and the Adobe PDF innovation which has reduced commercial faxing to the margins of advertising. As a recent district court noted:

> much has changed since 1991 … [and] the traditional fax machine [has gone] the way of the dinosaur. Most faxes are now received on computer fax servers that allow the recipient to view faxes on their computer and decide whether or not to print the document, reducing the cost to essentially zero.[45]

Part of this is due to the obvious fact that a single fax machine has no utility. A fax machine's utility is a function of the number of connecting machines that have available numbers and customers who are likely to have an interest in the product or service being offered.[46] However, the tremendous variation of advertising methods that use the internet undoubtedly had a tremendous impact on the fax machine's decline. A key feature of Internet

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43 *Id.*

44 2018 Unsolicited Fax Ads Report, 2-6.

45 *Physicians Healthsource, Inc. v. Allscripts Health Solutions, Inc.*, 254 F. Supp. 3d 1007, 1014-15 (N.D. Ill. 2017).

46 The fax machine had some residual advantages based upon acceptance of fax signatures as genuine. That advantage has been largely removed by the Electronic Signatures in Global and National Commerce Act of 2000 ("e-sign"), 15 U.S.C. § 7001, which provides that electronic signatures cannot be treated as invalid simply because the signature is electronic. Further, the Affordable Care Act ("ACA") includes substantial incentives for medical providers to convert medical records to electronic format, as well as disincentives for those who fail to do so.

advertising has been the ability to target advertisements through demographic information about a potential customer(s) and specific information regarding the product types, brands, and price ranges that a specific customer was interested in purchasing.

Collectively, these changes have resulted in a market that is vastly different in 2019. All sorts of computers are used to receive "faxes" and traditional facsimile machines are rapidly losing utility. Increasingly, documents are being shared via electronic means, via cloud services and less often via fax technology. These changes have dramatically reduced complaints regarding unsolicited faxes to *de minimis* levels, and the Commission has consistently informed Congress that it is focusing its enforcement resources elsewhere.[47] Such changes must also be considered when addressing the scope of the TCPA's fax advertisement restrictions.

C. Statistical Data Demonstrates the Rapid Decline of Faxing as a Major Form of Advertising

The use of facsimiles for advertising was becoming dramatically less common as early as 1999. The Direct Marketing Association[48] ("DMA") is a leading association representing a wide variety of companies that are interested in direct marketing. The DMA has published the DMA Statistical Fact Book since 1978. The purpose of this publication is to provide reliable statistical data to benchmark various types of direct marketing, their costs, and in

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47 *See, e.g.*, 2018 Unsolicited Fax Ads Report.

48 The DMA changed its name to the "Digital Marketing Association" briefly before it merged with the Association of National Advertisers on July 1, 2018 ("ANA").

some instances, their perceived efficiency. The period covered by the DMA Statistical Fact Book allows an analysis of trends.[49]

Because e-mail communications were not considered significant enough to track in 1998, the drop in outbound faxes coincided with the almost simultaneous increase in outbound e-mails to customers and prospects. For example, in the 2001 DMA Statistical Fact Book, which discusses data from 2000, the results showed the percentage of companies using out-bound faxes fell from 23% in 1999 to 12% in 2000 — a percentage drop of almost 50%. During the same year, e-mails to customers increased from 28% to 42% and e-mails to prospects increased from 23% to 26% in one year.

And, the DMA Statistical Fact Books for 2008, 2010,[50] 2013, 2015 and 2016 have no statistical data on faxing as a form of outbound advertising. The 2008 DMA Statistical Fact Book states that e-mails to prospects was 50% in 2006 and 41% in 2007, while e-mails to customers was 67% in 2006 and 62% in 2007.[51] In 2010, 94% of company's surveys used email marketing.[52]

Data from 2012 and 2015 that was published in the 2016 DMA Fact Book identified mediums for advertising campaigns, and importantly did not list faxing. E-mails were

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49 DMA Fact Books are available online for 2001, 2013 and 2015. The Library of Congress has DMA Statistical Fact Books from 2000, 2008, 2010, and possibly other years. Counsel for AmeriFactors has been able to obtain DMA Fact Books for sale on the internet for the years 2007, 2008 and 2016.

50 2010 DMA Statistical Fact Book, 68 (attached as hereto **Exhibit B**).

51 2008 DMA Statistical Fact Book, 17 (attached as hereto **Exhibit C**).

52 2010 DMA Statistical Fact Book, 68.

used 83% of advertisers in 2012 compared to 82% in 2015, (2012 data listed first, 2015 data second) followed by direct mail, 79/50%; catalogs; 47/39%; paid research 48/30%; online display, 32/29%; Telephone, 32/17; social media 0/34%; mobile 11/10%; and other 0/5%.[53] These statistics suggest the dominance of e commerce for promotions except for mail which was still widely used.

The full impact of these trends can best be seen by comparing the statistics for emails and faxes for years 1998, 1999, and 2000, with 2005-2007 data. (By 2007 the DMA had no fax category, presumably because the market share of faxing fell even lower.)

	1998	1999	2000	2001[54]	2002	2003	2004	2005	2006	2007
Faxes -- all outbound	21%	23%	12%	n/a	n/a	n/a	n/a	7%	4%	n/a
Emails customer	n/a	28%	42%	n/a	n/a	n/a	n/a	64%	67%	62%
Email prospects	n/a	23%	26%						50%	41%
	2000 DMA, p. 24[55]	2001 DMA, p. 25[56]	2001 DMA, p. 25					2007 DMA, p. 17	2007 DMA, p. 17	2008 DMA, p. 17

In the first year that emails were reported (1999), they had a higher percentage (28% to 23% than faxing). In 2000, outbound faxing was down, from 23% (in 1999) to 12%. By 2005, faxing has fallen to 7% compared to 40% for emails directed to prospects and 64% for

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53 2016 DMA Statistical Fact Book, 4 (attached hereto as **Exhibit D**).

54 2007 DMA Statistical Fact Book (attached hereto as **Exhibit E**).

55 2000 DMA Statistical Fact Book, 24 (attached hereto as **Exhibit F**).

56 2001 DMA Statistical Fact Book, 25 (attached hereto as **Exhibit G**).

emails sent to customers. In 2006, the trend was even more significant. Faxes fell from 7% to 4% or about a 43% decrease in one year, while emails increased.

Because these statistics measure the percentage of businesses that use a methodology, not the number of messages sent, the relationship between emails and faxes is probably substantially understated. The 2015 DMA Statistical Fact Book surveyed the number of U.S. emails sent per month as part of marketing efforts or transactional or business emails. The monthly percentage was as follows:[57]

31%	500,000 – 999,995 per month
25%	1,004,000 – 1,499,999 per month
18%	1,500,000 – 1,999,999 per month
11%	2,500,000 per month

This means only 15% companies sent fewer than 500,000 emails per ***month***. The cost of sending an email is substantially less than the sender's cost of sending a fax, which requires paying for telephone service, and often a fax "specialist."

There is no evidence that the TCPA has led to the steep decline in the use of fax marketing. The collapse of fax marketing occurred ten years after the enactment of the TCPA. In 2000, there were few if any TCPA-fax class actions.[58] Instead, the availability of high-speed Internet access and inexpensive computers rapidly changed the technological landscape. The growth of other forms of Internet advertising (*i.e.*, social media) also contributed to the move

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57 2015 DMA Statistical Fact Book, 188 (attached hereto as **Exhibit H**).

58 A search in the Westlaw "all federal" and "all states" libraries show that there were only 17 reported TCPA class action fax opinions from 1991-2002 and there were only 10 reported state TCPA fax class opinions in the same period. (State trial court opinions are generally not reported in WestLaw).

away from older technologies to convey marketing and advertising. And, sales of fax machines peaked in 1997 with fax machine sales in the United States decreasing from $1.139 billion in 1998 to $70 million in 2010.[59] At the same time, sales of computers increased in market penetration both in the home and work place. Email advertising and marketing increased from 422 million in 1999 to 4.58 billion in 2003,[60] more than a 10-fold increase.

II. IN CONSIDERING THE CONSTITUTIONALITY OF THE TCPA FAX PROVISIONS, THE COMMISSION SHOULD CONSIDER THE CONSEQUENCES OF TREATING E-FAXES AS A VIOLATION UNDER A STRICT LIABILITY STANDARD

Regulations or state actions that substantially "chill" permissible speech are subject to attack under the First Amendment. In *New York Times v. Sullivan*, public officials had the benefit of a libel statute that created special privileges for public office holders regarding publications that were deemed "libelous per se."[61] The defendant had "no defense as to stated facts unless *he can persuade the jury* that they were true in all their particulars."[62] Not only did the defendant have the burden of proof of truthfulness, but general damages were presumed, and may be awarded without proof of actual injury.[63]

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59 *See* **Exhibit I.**

60 2001 DMA Statistical Fact Book, 137.

61 376 U.S. 254, 267 (1964).

62 *Id.* (emphasis added).

63 *Id.* The New York Times had been sued by five separate plaintiffs, including the governor, all claiming that they were the person the defendants criticized in the one advertisement.

The most important factors include the standard of liability and the amount of exposure if found liable. The TCPA imposes a strict liability standard while imposing risk of $5 - $15 million of damages for 10,000 faxes sent. In fact, the minimum statutory penalty of the TCPA, imposed without reference to fault, creates a disproportionate recovery to any actual harm.

The obvious purpose of the statutory penalty was to provide a sufficient incentive to sue. Congress determined that $500 was enough for that purpose. There was no indication that class actions would be used to enforce the statute, especially when consent would presumably be an individual issue and the burden of proof on that issue had not been allocated to the defendant as part of its burden in 1991. The fact that actual damages are non-existent or *de minimis*, means class awards in the tens-of-millions do nothing more than line the pockets of attorneys while destroying legitimate business that were likely duped by a judgment-proof fax marketing "expert." And, to top it all off, courts have found that defendants are not able to challenge these statutory penalties as excessive fines under the Eighth Amendment to the Constitution.[64] Nor are the damages awarded in a TCPA class action subject to review under *BMW of North America v. Gore*[65] or *State Farm Automobile Insurance Co. v. Campbell*,[66] which established significant restrictions on punitive damage awards. Instead, the analysis of TCPA

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64 *Browning Ferris Industries of Vermont, Inc. v. Kelco Disposal Inc.*, 492 U.S. 257, 266-67 (1989). (The excessive fine provision of the VIII Amendment excessive fines does not apply to private suits.)

65 517 U.S. 559 (1996).

66 538 U.S. 408 (2003).

awards has generally been based on what has been characterized as a more limited due process review.[67]

In 1991, when the statute was enacted, there is no reason to believe that TCPA cases would be brought as class actions. Neither the legislative history of the TCPA nor the 2005 Junk Fax Prevention Act include any reference to "class action" or Federal Rule of Civil Procedure 23.[68] The most relevant legislative history demonstrated that Senator Hollings, the key sponsor, anticipated that state small claims court proceedings would be used to assert claims because "small claims court or a similar court would allow the consumer to appear before the court without an attorney. The amount of damages in the legislation is set to be *fair to both the consumer and the telemarketer*."[69] However, today's class action environment has perverted these incentives. Tens of millions of dollars in potential liability for sending e-faxes that cause no actionable damages is anything but fair. It is clear that Congress never considered the

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67 Damages awarded pursuant to a statute violate due process only if they are "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *St. Louis I.M.&S Ry Co. v. Williams*, 251 U.S. 63, 66, 69 (1919); *see also Capital Records, Inc. v. Thomas Rasset*, 692 F.3d 899, 907 (8th Cir. 2012); Sheila Scheurman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103 (2009) (emphasizing that statutory minimum damages and class actions were intended to provide incentives to sue for small claims, but the combination of the two led to unintended and unreasonable consequences.).

68 A word search of the complete legislative history for the 1991 TCPA and the 2005 Junk Fax Acts for the terms "Rule 23" or "class action" yielded no results.

69 137 Cong. Rec. 30821-30822 (1991) (emphasis added).

possibility that the minimum statutory recovery would be used in class actions.[70] To make matters worse (especially for a company depending upon credit), courts generally do not allow pre-emptive due process attacks on the minimum statutory damages.[71]

There were other reasons to believe that Congress did not anticipate that TCPA cases would be brought as class actions. The TCPA authorizes *parens patriae* suits by state attorneys general who can only bring cases when there is "reason to believe that any person has engaged or is engaging in *a pattern or practice of telephone calls* or other transmissions [ ] in violation of this section or the regulations prescribed under this section[.]"[72] And penalties imposed by the FCC are subject to a rational standard tied to repeated violations that persist after warnings.[73] Compared to the exposure in most class actions, the maximum statutory penalty from an FCC action is relatively minor. These facts demonstrate that the class action procedure was not viewed by Congress as essential to enforcing the provisions of the TCPA.

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70 Yuri Linetsky, *Protection of "Innocent Lawbreakers": Striking the Right Balance in the Private Enforcement of the Anti "Junk Fax" Provisions of the Telephone Consumer Protection Act*, 90 Neb. Law. R. 70, 89 (2011).

71 *See Centerline Equipment Corp. v. Banner Personnel Service, Inc.*, 545 F. Supp. 2d 768, 777-78 (N.D. Ill. 2011).

72 47 U.S.C. 227(g)(1).

73 47 U.S.C. § 227(e)(5). As of May 2, 2018, the $10,000 forfeiture per violation was raised to $19,639 based upon the authorized inflation adjustment. *See* 2018 Unsolicited Fax Ads Report 2 n. 7. In fact, the FCC must provide a Citation to violators prior to seeking penalties or "forfeitures." *See* 47 U.S.C. § 503(b)(2)(E); 47 CFR § 1.80. If Congress amended the TCPA to require such notice as a condition precedent for a private action, many issues that adversely affect small business would be substantially resolved.

On the other hand, imposing the burden of proof on a defendant that has no practical ability to meet that burden without individual inquiry is patently unjust. The ratio of the minimum statutory damages to actual damages understates the real consequences.[74] The true measure of damage is not the damage ratio, but rather the actual amount of damages that a defendant is subject to if it loses a fax class action.

In addition, TCPA defendants are often victims of unscrupulous fax marketers that provide assurances of an effective and legal marketing strategy, so they can earn hundreds of dollars, while imposing millions of dollars of exposure on their "clients who are unaware of the statute."[75] In *Bridgeview Health Care Center, Ltd. v. Clark*, the court described the harsh reality of TCPA fax litigation:

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74 The burden of proof as to consent under the 1991 enactment was allocated to the defendant by the FCC, and that position has been generally adopted by the Courts. *True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F. 3d 923, 931 (9th Cir. 2018); *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Protection Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd. 3787, 3793-96 (Apr. 6, 2006) (sender of fax has the burden of proof to establish prior business relationship but is not required to keep any specific records); *Van Patten v. Vertical Fitness Group, LLC,* 847 F. 3d 1037, 1044 (9th Cir. 2017).

75 *Bridgeview Healthcare*, 816 F. 3d at 941; *Fax.com, Inc.*, File No. EB-02-TC-120, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 15927 (2002). In *Fax.com*, the FCC imposed substantial fines on one of the leading fax blasters in the industry who had engaged in repeated violations. The FCC imposed a fine of $5,379,000 for conduct that included ignoring FCC warnings, intimidation of customers by threatening civil and criminal actions in distant states and lying to FCC staff. *Id.*, ¶¶ 16, 22-23, and 25. However, the most relevant type of misconduct is misleading customers into believing that the faxes were entirely legal. The record does not disclose to its client the broad prohibition on faxing unsolicited advertisements. Further, Fax.com's extensive promotional website which does not mention Section 227. Information on the website creates the erroneous impression that opt-out numbers provide the only recourse for consumers who to object to receiving unsolicited fax advertisements. *Id.*, ¶ 24. The

> Fax paper and ink were once expensive, and this may be why Congress enacted the TCPA, but they are not costly today. As a result, what motivates TCPA suits is not simply the fact that an unrequested ad arrived on a fax machine. Instead, there is evidence that the pervasive nature of junk-fax litigation is best explained this way: it "has blossomed into a national cash cow for plaintiff's attorneys specializing in TCPA disputes." We doubt that Congress intended the TCPA, which it crafted as a consumer-protection law, to become the means of targeting small businesses. Yet in practice, the TCPA is nailing the little guy, while plaintiffs' attorneys take a big cut. Plaintiffs' counsel in this case admitted, at oral argument, that they obtained B2B's hard drive and used information on it to find plaintiffs. They currently have about 100 TCPA suits pending. Congress likely should have targeted the marketing firms, rather than their unsuspecting clients. Nevertheless, we enforce the law as Congress enacted it.

The ability of repeat-offender Caroline Abraham[76] and her company B2B to continue to operate with impurity demonstrates a critical flaw in the private class action enforcement as it is developed under the fax provisions of the TCPA. A sample of Ms. Abraham's conduct can be found in *Avio, Inc. v. Alfoccino, Inc.* where the uncontested evidence was that Ms. Abraham, owner of B2B, lied to the defendant about having prior consent before sending the faxes.[77] As a result, her customer (the defendant) was potentially liable for up to $10 million based on B2B's fax transmission to *unconsenting* potential customers. The Sixth Circuit Court of Appeals reversed the district court's grant of summary judgment in favor of the defendant because the

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Commission concluded that Fax.com had affirmative misstated federal law governing unsolicited facsimile advertisements.

76 *Imhoff Investment, LLC v. Alfoccino, Inc.*, 792 F.3d 627, 635 (6th Cir. 2015); *see also Dewar v. Dough Boy Pizza, Inc*, 184 So. 3d 1169, 1170 (Fla. 2d Dist. Ct. App. 2015) (reversing summary judgment on TCPA case based on vicarious liability despite the fact that B2B assured the defendant that "its services were legal").

77 18 F. Supp. 3d 882, 887 (E.D. Mich. 2014).

FCC defined "sender" to include the entity on whose behalf the facsimiles were transmitted.[78] Thus, the defendant that was lied to by Ms. Abraham was now liable for her conduct. Meanwhile, the principal of B2B escaped suit claiming she was judgment proof. But the Plaintiff's counsel has no financial interest in stopping such behavior. If they did, they could have named B2B and its owner and obtained a stipulated permanent injunction with virtually no effort.

Prolific TCPA plaintiffs' attorneys have used B2B's fax logs to generate over one hundred class actions against unsuspecting defendants.[79] Despite this fact, the FCC has never taken any action against the broadcaster B2B and no class action plaintiff's attorney has sought an injunction prohibiting this type of behavior.

All of this shows that there is a fundamental disconnect between class action enforcement of the fax provisions of the TCPA and measures to stop the stimulus for the violations who are commonly the fax marketers. The market incentives for the plaintiff's bar is

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78 *Imhoff Investment, LLC v. Alfoccino, Inc.*, 792 F.3d 627, 635 (6th Cir. 2015).

79 This relationship is further described in *Reliable Money Order, Inc. v. McKnight Sales Co., Inc.*, 704 F. 3d 489 (7th Cir. 2013). A sample of the TCPA cases involved B2B: *Palm Beach Golf Center Boca, Inc. v. Sarris*, 311 F.R.D. 688, 691 (S.D. Fla. 2015) (referring to Ms. Abraham as a "modern day typhoid Mary"); *APB Assoc's Inc. v. Bronco's Saloon, Inc.*, 297 F.R.D. 302 (E.D. Mich. 2013), *Compressor Engineering Corp. v. Mfrs. Financial Corp.*, 292 F.R.D. 433 (E.D. Mich. 2013);*Machesney v. Lar-Bev of Howell, Inc.*, 292 F.R.D. 412 (E.D. Mich. 2013); *Compressor Engineering Corp. v. Thomas*, 319 F.R.D. 511 (E.D. Mich. 2016); *Bridging Communities, Inc. v. Top Flite Financial Inc.*, 843 F. 3d 1119 (6th Cir. 2016); *The Siding and Insulation Co. v. Combined Ins. Group Ltd., Inc.*, No. 1:11-cv-1062, 2014 WL 1577465 (N.D. Ohio Apr. 17, 2014); *The Siding and Insulation Co. v. Alco Vending, Inc.*, No. 1:11-cv-1060, 2017 WL 3686552 (N.D. Oh. Aug. 25, 2017); *Sawyer v. KRS Biotechonology, Inc.*, Case No. 1:16-cv-550 (S.D. Ohio Feb. 19, 2019).

to identify a solvent company that sent a large number of faxes regardless of fault or knowledge about what has been the described as an obscure statute.[80] The decline of faxing, undoubtedly has made the obscure provisions of the TCPA and even more obscure FCC interpretations buried within the *Federal Register* virtually undiscoverable for the average businessman who might believe that statute means what is says and a computer is not a fax machine.

III. THE FIRST AMENDMENT AND COMMERCIAL SPEECH

The First Amendment prohibits the enactment of laws "abridging the freedom of speech."[81] Under that clause, a government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[82] The Supreme Court recently confirmed in *Reed v. Town of Gilbert, Ariz.,* that content-based laws – those that target speech based on its communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.[83] The Court found that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." The Court further confirmed that such content-based laws are subject to strict scrutiny "regardless of the

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80 *Creative Montessori Learning Centers v. Ashford Gear, LLC*, 662 F.3d 913, 916 (7th Cir. 2011) ("TCPA imposes potentially very heavy penalties on violators, many of whom quite possibly including tiny Ashford Gear have never heard of the obscure statute.")

81 U.S. Const. Amdt. 1.

82 *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

83 *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015).

government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."[84]

In the beginning, commercial speech received no protection under the First Amendment. The Supreme Court viewed advertising, not as a form of protected speech, but as another regulated activity, declaring that there was "no [First Amendment] restraint on government as respects purely commercial advertising."[85] However, in the 1960s, the Supreme Court's position toward commercial speech began to change and in *New York Times Co. v. Sullivan*, the Supreme Court held that a paid advertisement describing the struggle for civil rights in Alabama was protected by the First Amendment despite being published for profit.[86] And, in *Bigelow v. Virginia*, the Court held that Virginia could not criminalize advertisements in its newspapers for abortions in New York.[87] Finally, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Supreme Court expressly held that the First Amendment provides some protection for commercial speech, which it has defined as "speech which does 'no more than propose a commercial transaction.'"[88] The Supreme Court in *Virginia State Board of Pharmacy* found: "[a]s to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than this interest in

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84 *Id.* at 2227-28 (internal citations omitted).

85 *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

86 376 U.S. 254, 265-66 (1964).

87 421 U.S. 809, 829 (1975).

88 425 U.S. 748, 762 (1976); *see also Board of Trustees of State University of N.Y. v. Fox*, 492 U.S. 469, 473-74 (1989).

the day's most urgent political debate."[89] One risk of such regulations is that there is information that can be sent by facsimile to doctors and other practitioners which can lead to financial ruin despite the critical importance of the information, even if the recipient will never be charged for the product.[90]

However, the Court in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n,* determined that the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression.[91] Yet, since *Central Hudson,* Supreme Court jurisprudence suggests that the level of scrutiny applied to commercial speech is rising with more protection offered to commercial speech than *Central Hudson* seems to require.[92] In fact, most recently, in *Sorrell v. IMS Health, Inc.*, the Supreme Court found that because the

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89 *Id.* at 763.

90 *Carlton & Harris Chiropractic, Inc. v. PDR Network*, 883 F.3d 459 (4th Cir. 2018), *cert granted in part,* 139 S. Ct. 478 (Nov. 13, 2018). This problem arises because the value of an unsolicited "advertisement" is given no weight despite the fact that proper constitutional analysis requires that factor be taken into consideration.

91 *See Central Hudson*, 447 U.S. 557, 562-63.

92 *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 (1996) (striking down statute finding "when a State entirely prohibits the dissemination of truthful, non-misleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands."); *Thompson v. Western States Medical Center*, 535 U.S. 357, 377 (2002) (invalidating federal ban on pharmacists' advertising of compounded drugs); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 566-67 (2001) (invalidating Massachusetts's outdoor advertising restrictions on smokeless tobacco and cigars); *United States v. United Foods, Inc.*, 533 U.S. 405, 415-16 (2001) (invalidating a federal statute that compelled a mushroom company to fund certain advertisements); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486 (1995) (invalidating federal ban on including alcohol content on beer labeling).

statute imposed a content-based burden on protected expression – "heightened judicial scrutiny [was] warranted." [93]

IV. SECTION 227(B)(1)(C) OF THE TCPA (THE FAX PROVISION) IS SUBJECT TO STRICT SCRUTINY

Strict scrutiny is a rapidly evolving doctrine, but in only one direction toward greater protection against all content-driven speech. Recent Supreme Court decisions indicate an expansion of its scope to offer more protection to First Amendment freedoms. Even though the Supreme Court has yet to consider a challenge to the TCPA under strict scrutiny grounds, several district courts have recently found elements of the TCPA to be content-based restrictions.[94]

The Fourth Circuit has recently held that the TCPA provisions relating to the government debt exemption were unconstitutional.[95] The Fourth Circuit agreed with the holding of the district court that the statute was subject to strict scrutiny under *Reed.* The court quoted

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93 564 U.S. 552, 565 (2011).

94 Several district courts have found various provisions and exceptions of the TCPA's telephone provisions to be content-based and have applied strict scrutiny. *See Brickman* v. *Facebook, Inc.,* 230 F. Supp. 3d 1036 (N.D. Cal. 2017); *Holt v. Facebook, Inc.,* 240 F. Supp. 3d 1021 (N.D. Cal. 2017); *Gallion v. Charter Communications, Inc.,* 287 F. Supp. 3d 920 (C.D. Cal. 2018); *Greenley v. Laborers' International Union of North Am,,* 271 F. Supp. 3d 1128 (D. Minn. 2017); *American Association of Political Consultants* v. *Sessions,* 323 F. Supp. 3d 737 (E.D.N.C. 2018); *Mejia v. Time Warner, Cable Inc.,* No. 15-CV-6445, 2017 WL 3278926 (S.D.N.Y. Aug. 1, 2017). Yet, even applying strict scrutiny, the TCPA has been upheld because of the narrow scope of the restrictions. A minority of district courts have refused to apply the strict scrutiny to the TCPA telephone cases. *See Mayo Venture Data, LLC,* 245 F. Supp. 3d 771 (N.D. W.Va. 2017); *Woods v. Santander Consumer U.S.A. Inc.,* Case No.: 2:14-CIV-02104-MHH, 2017 WL 1178003 (N.D. A.S.D. 03/30/2017).

95 *Am. Ass'n of Political Consultants, Inc. v. FCC,* No. 18-1588, 2019 WL 1780961 (4th Cir. April 24, 2019).

with approval the district court's analysis that strict scrutiny applied because qualifying for the exemption "derives from the call's communicative content" and requires the court to review such citing content.[96] The Fourth Circuit rejected the Commission's argument that the restriction was based on "relationship of the parties."[97] The proper test was whether the characterization of the call "depends entirely on the communicative content of the call" and if it does, the restriction is "content-based" and subject to strict scrutiny.[98]

Once the restraint was characterized as dependent on the content of the speech, the court found the government must demonstrate a compelling governmental interest and that the restrictions must be narrowly tailored to avoid unnecessary restrictions. However, those interests were not served by the exemption for government debts, as the court found: "the exemption applies in a manner that runs counter to the privacy interests that Congress sought to safeguard."[99] The court reasoned that the exemption was not narrowly tailored to protect legitimate interests because there was no limit on the manner that such calls could be made by those consumers who fell within the exemption. The debt-related calls were the largest number of complaints to the FCC.[100] The other two exemptions in the Act – emergency calls and consent – were much less intrusive.

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96 *Id.* (citing *Am. Ass'n of Political Consultants v. Sessions*, 323 F. Supp. 3d 737, 744 (E.D. N.C. 2018)).

97 *Id.* at *5.

98 *Id.* at *5 (citing *Reed v. Town of Gilbert,* 135 S. Ct. 2218, 2227 (2015)).

99 *Id.* at * 7.

100 *Id.* at *7.

Government regulation of speech is "content based" if a law applies to particular speech because of the topic discussed or the idea or message expressed.[101] An "obvious" example of a content-based regulation is one that "'defin[es] regulated speech by particular subject matter."[102] Subsection 227(b)(1)(C) of the TCPA fits squarely within that definition as it only applies to advertisements concerning the quality or availability of goods, property or services.[103] Thus, the *same individual* will be penalized (or not penalized) based *purely* on the content of what he says. If the person sends a facsimile soliciting job applicants for a new opening, he likely will not be punished because the fax is "informational" – but if he changes the topic discussed to an advertisement of the company, he will be subject to up to $1,500 in penalties.[104] For example, an advertisement to hire someone is clearly not advertising the commercial availability or quality of property, goods or services.[105] Because whether the

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101 *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015).

102 *Id.*

103 47 U.S.C. § 227(b)(1)(C).

104 *See Lutz Appellate Services, Inc.* v. *Curry*, 859 F. Supp. 180 (E.D. Pa. 1994) (finding advertisement seeking applicants to serve as appellate attorney not covered by TCPA); *N.B. Industries* v. *Wells Fargo & Co.*, 2010 WL 4939970 (N.D. Cal. 2010) (finding facsimile promoting annual Asian Business Leadership Award was not covered by the TCPA). *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, ¶¶ 49-54 (2006) (explaining various circumstances in which a facsimile message may or may not be considered "unsolicited advertisements" under the TCPA).

105 *See* 47 U.S.C. § 227(a)(5) (defining "unsolicited advertisements.").

facsimile qualifies under the TCPA depends on what the sender *says* to the receiving party, the statute clearly "draws distinctions based on the [facsimile's] communicative content."[106]

It has been the FCC's position that the TCPA should be analyzed under the *Central Hudson* framework for commercial speech, not the more rigorous strict scrutiny standard.[107] But, the TCPA fax provisions do not regulate solely commercial speech.[108] Simply because Section 227(b)(1)(C) regulates advertising does not mean that it necessarily only regulates *commercial* speech.[109] Section 227(b)(1)(C) regulates "unsolicited advertisements"

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106 *Reed*, 135 S. Ct. at 2228; *see also McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (noting that a statute is content-based "if it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)); *United Bd. Of Carpenters & Joiners of Am. Local 586 v. NLRB*, 540 F.3d 957, 966 (9th Cir. 2008) ("We . . . reiterate that the examination of the content of a speaker's message is the hallmark of a content-based rule.")

107 *See, e.g., Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 17 FCC Rcd 17459, 17468, ¶ 12 (citing *Central Hudson Gas & Elec. Corp. v. Public Service Commission*, 447 U.S. 557 (1980)) (2002).

108 *See Moser v. FCC*, 46 F.3d 970, 973 (9th Cir. 1995) ("[N]othing in the statute requires the Commission to distinguish between commercial and noncommercial speech . . . ."); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 504-05 n. 11 (1981) (plurality opinion) (recognizing that a facial challenge to a statute regulating commercial and noncommercial speech can be pressed by a party even if that party engaged only in advertising); *Café Erotica of Fla., Inc. v. St. Johns Cty*., 360 F.3d 1274, 1281 (11th Cir. 2004) (recognizing that defendants "engag[ing] in commercial advertising does not prevent us from considering their facial challenges" to the statute as content-based restriction of both commercial and noncommercial speech).

109 *See, e.g., Bolger v. Youngs Drug Products Corp.*, 463 U.S. at 66 (finding the "mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech"); *Board of Trustees of State University of N.Y. v. Fox*, 492 U.S. 469, 482 (1989) (finding that speech that is uttered for a profit is not necessarily "commercial speech").

which include a broader swath of messages than merely those that propose a commercial transaction. For example, under the FCC's interpretation of "unsolicited advertisement," a flyer promoting a Girl Scout cookie sale that was blasted out by an unassociated volunteer via facsimile machine may constitute an "unsolicited advertisement," because cookie sales could be considered commercial speech as it does propose a commercial transaction.[110] As shown, in *American Associations of Political Consultants*, the FCC lost on the argument that the restriction at issue was not based on content, but who the speaker was. The court rejected that requirement because to evaluate the claim, the court had to consider the content of the speech. Further, courts have held that whether the message is advertising under the TCPA may have to be decided on the basis of a factual record and not simply from the four corners of an advertisement.[111]

On top of the fact that the TCPA applies to both commercial and non-commercial speech, the TCPA should be analyzed under the strict scrutiny standard because Section 227(b)(1)(C) discriminates *among* different purportedly "commercial" messages based on

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110 Messages that are "part of an overall marketing campaign" may be advertisements, even in if the specific message does not propose a commercial transaction. *See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, ¶ 53 (2006).

111 *See Matthew N. Fulton, D.D.S., P.C. v. Enclarity, Inc.*, 907 F.3d 948, 952-54 (6th Cir. 2018) ("Advertising" issue is subject to plausibility test and the plaintiff has a right to prove communication was pretextual advertising); *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 847 F.3d 92, 95 (2d Cir. 2017) (finding defendant can rebut an inference that the message had a commercial pretext, but only after discovery); *see also Carlton & Harris Chiropractic, Inc. v. PDR Network LLC*, 883 F.3d 459 (4th Cir. 2018), *certiorari granted in part, PDR Networking LLC v. Carlton & Harris Chiropractors, Inc.*, 139 S. Ct. 428 ____ U.S. ____ (Nov. 13, 2018) (finding that faxes that offer free goods may be "advertisements" under the TCPA).

content (*i.e.*, whether it advertises the availability or quality of goods, property or services). A provision "[f]avoring some commercial speech over other commercial speech is a content-based provision" subject to strict scrutiny.[112] Indeed, in *R.A.V. v. City of St. Paul,* the Supreme Court applied strict scrutiny to an ordinance restricting fighting words – completely *unprotected* speech – because it discriminated *among* fighting words based on subject matter, and noted that the same principle would also apply in the commercial speech context, where, as here, "the basis for the content discrimination [does not] consist [ ] entirely of the very reason the entire class of speech at issue is proscribable[.]"[113]

For these reasons, if the Commission were to apply the TCPA's fax provisions to transmissions received on online servers, via the cloud, or other unconventional faxing, an analysis of the constitutionality of such a restriction strict scrutiny would be required.

V. EVEN UNDER THE *CENTRAL HUDSON* STANDARD, SECTION 227(B)(1)(C)'S APPLICATION TO E-FAXES WOULD VIOLATE THE FIRST AMENDMENT

Even if the Commission determines that strict scrutiny is not required, the inquiry would just begin, and the statute would in all probability be held to be both over-inclusive and under-inclusive because it includes faxes received as emails and excludes emails that have the same consequences but are a hundred thousand-fold more common. Traditionally, the FCC has applied the *Central Hudson* test to the TCPA. Under that standard, too, application of the TCPA restrictions to documents received via email cannot be justified. An interpretation of Section

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112 *Bonita Media Enterprises, LLC v. Collier County Code Enforcement Bd.*, 2008 WL 423449, at *8 (M.D. Fla. 2008).

113 505 U.S. 377, 388-89 (1992).

227(b)(1)(C) to apply to facsimiles received as emails would invariably result in a successful First Amendment challenge because the government has no plausible interest in penalizing the sending of facsimiles that are received via online fax services while at the same time turning a blind-eye to the "extremely rapid growth in the volume of unsolicited commercial electronic mail."[114] If a person receives an unsolicited advertisement in their e-mail inbox, their recourse against the sender cannot be dependent on whether that document originated via fax protocol or via Internet protocol, because the message and injury to the consumer is the same.

Notably, there is no presumption of constitutionality when the issue relates to a restraint on protected speech, including commercial speech. For example, in *Edenfield v. Fane*, the Supreme Court considered the constitutionality of a Florida administrative code provision that prohibited solicitation from licensed accountants.[115] The Court held that the bar on in-person commercial solicitations by accountants violated the *Central Hudson* test and was therefore unconstitutional. The Court emphasized that "[u]nlike rational-basis review, the *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions."[116] When the restraint would result in a "prohibition" of "truthful and non-misleading expression" then "the State must satisfy the remainder of the *Central Hudson* test by demonstrating that its restriction serves a substantial state interest and is designed

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114 15 U.S.C. § 7701.

115 507 U.S. 761 (1993).

116 *Id.* at 768.

in a reasonable way to accomplish that end."[117] Thus, the burden is on the government to establish the restriction meets the elements of *Central Hudson.*[118]

"The penultimate prong of the *Central Hudson* test requires that a regulation impinging upon commercial expression 'directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose."[119] The Court reiterated the well-established rule that the "party seeking to uphold a restriction on commercial speech carries the burden of justifying it."[120] "[T]his burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[121] "Without this requirement, a State could with ease restrict commercial speech in the service of other objectives that could

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117 *Id.*

118 Counsel for AmeriFactors sent numerous Freedom of Information Act (FOIA) requests to the FCC seeking information on various relevant topics. The FCC responded to that FOIA request but provided no information regarding the number of faxes sent, the number of faxes converted to e-faxes, or any range of alleged aggregate injury caused by faxing, or e-faxes, much less e-mails.

119 *Id.* at 770.

120 *Id.* at 770 (quoting *Bolger* at 71 n.20).

121 *Id.* at 771.

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not themselves justify a burden on commercial expression."[122] Nor can a few anecdotes supply the required justification for the legislature to suppress free speech.[123]

Many if not all cases that have analyzed the TCPA under *Central Hudson* have relied upon the substantial government interest asserted at the time of the TCPA's passage – the indiscriminate printing and shifting of advertising costs to the recipient. For example, in 1995, the Ninth Circuit considered the constitutionality of the TCPA under the First Amendment, and upheld the TCPA fax restriction based upon the record evidence of cost shifting of advertising expenses and interference with the recipients' phone and fax messages as a legitimate governmental interest, and the prohibition of unsolicited commercial faxes as a reasonable "fit."[124] Similarly, the predominant interest identified by other courts considering TCPA cases were that the unsolicited facsimiles shifted advertising costs of paper and cartridge ink, and a concern that incoming facsimiles caused "interference with machines that could handle one incoming fax at a time."[125] In *Missouri ex rel Nixon*, the Eighth Circuit found the government had a substantial interest in regulating unsolicited faxes because of the shift in advertising costs to the recipient, the fact that it took 30 seconds for a one page fax to be received, which could tie up the phone line if the machine can only receive one fax at a time, 80% of faxes were printed on

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122 *Id.* at 771.

123 *Wollschlaeger v. State of Florida*, 848 F.3d 1293, 1312-14 (11th Cir. 2017).

124 *See Destination Ventures, Ltd, v. FCC*, 46 F.3d 54 (9th Cir. 1995).

125 *See Missouri ex rel Nixon v. American Blast Fax, Inc.*, 323 F.3d 649, 654-55 (8th Cir. 2003) (noting that unsolicited fax advertising interferes with the company switchboard operations and burdens the computer network of the recipients who route incoming faxes into their electronic e-mail systems).

paper, and unsolicited faxes interfered with company switchboard operations and burdens their computer networks.[126] But that case was based on the technology prior to 2000. The fact that the technology discussed in 1991 interfered with a switchboard demonstrates how irrelevant interference issues have become in the intervening decades.

Yet, those cases are useful as a time capsule to compare the technology 15-20 years ago with the current technology. *Missouri ex rel Nixon* and *Destination Ventures* cannot be used as prior precedent that automatically supports finding the TCPA constitutional. In fact, the advances in fax technology over the past two decades has had tangible effects on cost shifting and disruption to telephone facsimile machines, such that the governmental interest in regulating fax advertisements does not justify restrictions on the receipt of faxes via online fax services. As a result, even if a fax received via an online fax service could be construed as subject to an unambiguous TCPA provision, the government interest in addressing such services would not be "substantial." Indeed, "if a harm to the public is of a very small quantity, preventing that harm cannot be a substantial governmental interest."[127]

The core problem in sustaining the current interpretation of the TCPA to apply to facsimiles that are received as e-mails is that these "facsimile messages" cause none of the harms the TCPA was intended to prevent. Specifically, the privacy interest is restricted the telephone call sections of the TCPA of the portion of the TCPA related to telephone calls (to residential

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126 *Id*. The fact that the technology interfered with was a switch board demonstrates how irrelevant that the interference issue has become.

127 *See Centerline Equipment Corp. v. Banner Personnel Service, Inc.*, 545 F. Supp. 2d 768, 773 (N.D. Ill. 2008).

lines).[128] Protection for consumers and their seclusion-type privacy concerns especially the concern over solitude in one's home did not apply to the "business to business" oriented facsimile portions of the Act.[129] To the extent courts have supported a justification for the draconian damages imposed based on the time to look at an email or an e-fax, they are not providing a sufficient basis to support the constitutionality of the statute. The "inconvenience" of reviewing e-mails, junk mail, and even outdoor signs, is the same. The only way to ensure the constitutionality of the TCPA is to include only those forms of communications that interfere with regular telephone lines, tie-up a facsimile machine, or shift advertising costs by the automatic, indiscriminant printing of the message. Otherwise the TCPA fax provision becomes hopelessly overbroad, punishing parties who do not cause the harm that Congress sought to proscribe. Equally wrong, liability is imposed under a statute that would permit liability when computers are used on the receiving end rather than facsimile machines. This point is critical because the obvious alternative of excluding e-faxes will not restrict speech nearly as much, and yet, accomplish the legitimate interest of government, as well.[130] Fortunately, the FCC has the power and responsibility to make this correction, and by doing so, conform its policy to the

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128 47 U.S.C. § 227(b)(1)(B). *See also* § 227(1)(A) (regarding more specific restrictions); H.R. Rep. No. 317, 102d Cong., 1st Sess. 11 (1991).

129 *Id*.

130 *See Thompson*, 535 U.S. at 358 ("If the Government can achieve its interests in a manner that does not restrict commercial speech, or that restricts less speech, the Government must do so."); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490-491 (1995) (same); *Lorilland Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (statute restricting outdoor advertising of tobacco advertising unconstitutional because government failed to meet its burden that narrower restriction would not further its purpose as well).

statutory distinction Congress recognize between a computer and a telephone facsimile machine on the receiving end. Changes in technology, as well as the minimal impact of commercial e-faxes, necessitate that result.

A. There is no Substantial Government Interest Justifying the Application of the TCPA to E-faxes

In 1991, in enacting Section 227(b)(1)(C), Congress sought to curb two specific types of harms: (1) the shifting of advertising costs from the sender to the recipient and (2) the occupation of the recipient's fax machine "so that it is unavailable for legitimate business messages while processing and printing the junk fax."[131]

This is little question that the primary purposes of the fax portion of the TCPA was intended to stop occupying conventional fax machines and to prevent the transfer of advertising costs from the sender to the unsolicited recipient – paper and ink. As stated in the House Report:

> An office oddity during the mid-1980s, the facsimile machine has become a primary tool for business to relay instantaneously written communications and transactions. In an effort to speed communications and cut overnight delivery costs, millions of offices in the United States currently send more than 30 billion pages of information via facsimile machine each year. However, the proliferation of facsimile machines has been accompanied by explosive growth in unsolicited facsimile advertising, or "junk fax."
>
> Facsimile machines are designed to accept, process, and print all messages which arrive over their dedicated lines. The fax advertiser takes advantage of this basic design by sending advertisements to available fax numbers, knowing that it will be received and printed by the recipient's machine. This type of

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131 H.R. Rep. No. 317, 102d Cong., 1st Sess. 11 (1991).

> telemarketing is problematic for two reasons. First, it shifts some of the costs of advertising from the sender to the recipient. Second, it occupies the recipient's facsimile machine to that it is unavailable for legitimate business messages while processing and printing the junk fax.[132]

Although the cost shifting was a significant national concern at the time the TCPA was enacted, it is doubtful that the same justification can be presented today based on the current state of technology. The relevant analysis is tied not only to the average costs of transactions, but also the relevant size of the market, and its growth. These factors constitute the elements of aggregate harm that the government must prove against those factors, the harm in restricting a useful form of communication to the public, whether specifically approved or not. It is obvious that any converted fax to an email format is not received by a computer cannot occupy a facsimile machine.

In 2003, the FCC considered the issue of whether the TCPA applies to fax servers. The FCC concluded that "faxes sent to personal computers equipped with, or attached to, modems and to computerized fax servers are subject to the TCPA's prohibition on unsolicited faxes."[133] The FCC clarified that "the prohibition does not extend to facsimile messages sent as e-mail over the Internet." *Id.* The FCC justified its interpretation by finding that:

> Facsimile messages sent to a computer or fax server may shift the advertising costs of paper and toner to the recipient, **if they are printed**. They may also tie up lines and printers so that the recipient's requested faxes are not timely received. Such faxes may increase labor costs for businesses, whose employees must monitor faxes to determine which ones are junk faxes and which are related

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132 *Id.*

133 *2003 TCPA Report and Order*, ¶ 200.

> to their company's business. Finally, because a sender of a facsimile message has no way to determine whether it is being sent to a number associated with a stand-alone fax machine or to one associated with a personal computer or fax server, it would make little sense to apply different rules based on the device that ultimately received it.[134]

In 2015, the Consumer and Governmental Affairs Bureau (Bureau) issued a declaratory ruling, applying the 2003 Order, and concluded that an "e-fax" "is covered by the consumer protections in the [TCPA] and Junk Fax Prevention Act."[135] Of particular importance to this submission, the Bureau in the *Westfax Order* conceded an important fact: "[w]hile we understand that the *harm to recipients may be the same whether the e-fax begins as a fax or an e-mail*, (emphasis added) the Commission has previously interpreted the TCPA to apply only to those that begin as faxes."[136] "Those" refer to communications which started out as faxes," but ended as e-mails. This concession is at the center of the First Amendment implications caused by this interpretation. If the harm is the same as the e-mail, but the unsolicited e-mail is not prohibited, then how can the interest asserted be found to be compelling? Perhaps this logical inconsistency could be over looked if the commercial faxes were much more prevalent than commercial emails. But the reverse is true.[137]

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134 *Id.* (emphasis added).

135 *Westfax Order*, ¶ 1.

136 *Id*., ¶10 (emphasis added).

137 The total number of emails sent worldwide per day grew from 144.8 billion per day to 281 billion per day in 2018. Business email grew from about 124.5 billion per day. Source Radicati Group, Email Statistical Report, 2018-2022. Assuming that even 25% of those emails are in the United States that would amount to $58 billion emails are sent per day. Some data suggests that spam is over 80% over emails. *See* Radicati Group, Inc,

We recognize that there may be a substantial government interest in regulating facsimile messages that end up printed out on a stand-alone fax machine or a fax machine; however, as applied to "facsimile messages" that do not cause these harms, there is no substantial governmental interest.

1. E-faxes do not shift advertising costs as there is no automatic printing

In 1991, the main concern at the time was the shifting in advertising costs caused by the indiscriminate printing on a stand-alone fax machine. In 2003 and 2015, the FCC recognized that with facsimiles sent to computer fax servers, as opposed to stand alone facsimile machines, there is only a shifting of advertising costs ***if the recipient chooses to print the message.***[138] But, if a recipient chooses to voluntarily print the message then it cannot be said that the same harms and concerns that justified the TCPA in 1991 are still present. This statement also implicitly concedes that if a recipient chooses not to print the message and instead deletes the unsolicited advertisement then there is no harm or injury. It also assumes that the fax will avoid the spam filter, be noticed, be opened, and then be printed. Finally, emails can be printed out as easily as an e-fax, it is after all the same type form of communication, to the extent voluntary printing is a harm, it is avoidable. In any event, the failure to include all commercial emails would make the entire statute unconstitutional as massively being under inclusive and not

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Email Statistical Report, 2009-20013, estimating in 2009, 81 % percent of messages were spam. *Id* at p 4. However, spam filters seem to catch a large percentage since the percentage of "spam" in mailboxes is only 20%.

138 *2003 TCPA Report and Order*, ¶ 200; *Westfax Order*, ¶ 11.

sufficient to mitigate any substantial harms if the harm is defined as the time to review a fax subject line or open up a "junk fax" envelope.

2. E-faxes do not occupy a telephone line or fax machine preventing other messages from coming through

In the *Westfax Order*, the Bureau found that faxes sent to a computer or fax server "can cause 'interference, interruptions, and expense' that can result from junk faxes, whether physical or electronic."[139]

Contemporary computers, their software, and their connections are not like computers in 1990s when a computer would have a modem that would be connected to a regular telephone line. During some earlier era, personal computers may have always been connected to "regular telephone lines." But, now, it is hard to imagine that such regular telephone line connections are still common, especially since landlines are being replaced at a rapid rate. And, even if such interference would be theoretically possible, public policy should not regulate a highly unlikely event with severe sanctions when little or no harm actually occurs. At the very least, proof of such occurrence must be demonstrated by the plaintiff and any class member in a claim brought under the TCPA.

The most obvious problem is that all of the adverse consequences of faxing – tying up fax machines and shifting advertising expenditures – are all related to the issue of receipt of a telephone signal by a fax machine that automatically prints the document. Further, the communication is not received by a fax machine, so the statute is inapplicable. Since the final communication is in the form of an e-mail sent in most circumstances via a digital line or

139 *Westfax Order*, ¶ 11.

the "cloud" to the recipient, the transmission cannot pose a realistic threat of tying up lines, a fax machine, or automatically printing the communication. The statute clearly requires the receipt on a "telephone facsimile machine." The TCPA would make no sense if receipt (or interference) was not required. Why else would the statute specify a restricted type of machine on the receiving end? Even the *Westfax Order* recognized this requirement.[140]

Another point to consider is that in the 2003 TCPA Report and Order the scope of the discussion was limited to fax modems and fax services, with no discussion of e-faxes.[141] This distinction is important because underlying the key assumption was that fax servers (and presumably modems) enable multiple desktops to send and receive communications from the same or shared telephone line.[142] But we do not need to be too concerned about the rationale of the 2003 order regarding fax modems inside computers that were attached to a regular telephone line because technology and a changing market have made the issue largely irrelevant. Telephone modems in computers are virtually always a special-order item and rarely used in the present state of almost universal wi-fi access.[143]

But there is another fundamental problem with the *2003 TCPA Report and Order* and its inclusion of e-fax type communications: footnote 738 makes clear that the Commission recognized that "fax boards" do not fall within the statutory definition of a telephone facsimile

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140 *Westfax Order* at 8623, ¶ 9.

141 *2003 TCPA Report and Order*, ¶¶ 198-202.

142 *Id.*, ¶ 200, n. 738.

143 By 1994 computers with pre-installed fax modems "vastly outsold" fax machine sales, even though the fax modems did not necessarily imply use." FAXED, 185, n. 15.

machine" as defined in § 227(a)(3).[144] The original concern had a technical basis at the time since a fax had to use a fax modem to communicate with a dedicated telephone line. The dedicated modem was built in the PC fax board. The computer's external connection was on RJ-11 jack. Generally, the computer would not operate while a fax was being sent and received.[145] However, even as early as *1990*, this problem could be resolved by "background operation," which Michael Banks called a "popular and sometimes indispensable feature."[146] In 1990, Banks stated "if at all possible buy a PC fax board with this option; otherwise you'll be locked out of using your computer when you wish to use fax functions."[147]

What the above demonstrates is that there is no practical concern with facsimiles that are received by an online fax server tying up or preventing other messages from coming through. Thus, this justification cannot satisfy the government's burden in proving a substantial government interest.

3. Time spent reviewing an e-fax does not justify the restriction on speech

Time spent reviewing an unwanted message alone cannot justify a restriction on speech. For example, in *Bolger v. Youngs Drug Products Corp.,* on a challenge of a law that

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144 Although fax boards alone do not have the capability to transcribe text onto paper, the Commission nevertheless, determined that "fax modem boards which enable personal computers to transmit messages to or receive messages from conventional facsimile machines, or other computer fax boards are the functional equivalent of telephone facsimile machines." *Id.* at n. 736.

145 *See Understanding Fax And Electronic Mail*, Michael A. Banks, 1990, p. 60.

146 *Id.* at 70.

147 *Id.*

prohibited the mailing of unsolicited advertisements for contraceptives, the U.S. Supreme Court found that the justifications offered by the government for the regulation were insufficient to warrant the sweeping prohibition on the mailing of unsolicited contraceptive advertisements.[148] As stated in *Bolger*, "the short, though regular, journey from mail box to trash can … is an acceptable burden, at least so far as the Constitution is concerned." [149]

Likewise, the Commission's justification for its interpretation, namely that the faxes "may increase labor costs for businesses, whose employees must monitor faxes to determine which ones are junk faxes and which are related to their company's business" is not a sufficient governmental interest. The time spent reviewing the unwanted facsimile message received in an e-mail inbox before it is deleted is comparable to the "journey" that the Supreme Court has found to be an "acceptable" constitutional burden. These justifications also assume that the e-fax has not been diverted to a spam filter.

Although not asserted in the legislative history or the 2003 or 2015 pronouncements from the FCC, a concern often raised in TCPA litigation is the interest of preserving one's privacy. Yet, that interest is not a compelling or substantial interest vis-à-vis unsolicited facsimile messages.

First, the privacy interest, to the extent it is mentioned in the legislative history, relates almost exclusively to the telephone provisions of the TCPA, not the facsimile provisions. Second, the focus on privacy in the legislative history concerned *residential* privacy interests –

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148 463 U.S. 60, 75 (1983).

149 *Id.* at 72 (quoting *Lamont v. Commissioner of Motor Vehicles*, 269 F. Supp. 880, 883 (S.D.N.Y. 1967)).

your home is your castle.[150] Unsolicited fax advertisements are not sent to residential landline telephone numbers. *See Woods v. Santander Consumer U.S.A., Inc. supra.,* 2017 WL 1178003

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150 The preamble and congressional findings of fact relate to the privacy interests associated with phone calls to residences.

The Congress finds that:

(1) The use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques.

(6) Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.

(9) Individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and marketing practices.

(10) Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.

(11) Technologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumers.

(12) Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.

(13) While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for those types of automated or recorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls.

at *4 (Emphasizing the important privacy interest under the TCPA in protecting residential lines because of unique importance of solitude in the home). A business cannot assert a privacy interest sufficient to justify the restriction on speech.[151]

For example, in American *States Insurance Company v. Capital Associates of Jackson County, Inc.*, the Seventh Circuit considered whether the fax provisions of the TCPA were an invasion of privacy under Illinois law sufficient to trigger insurance coverage.[152] Judge Easterbrook reviewed the legislative history of the TCPA, as well as the prevailing view that corporations do not have a right to privacy. In his opinion, Judge Easterbrook stated:

> One reason to doubt that the policy covers the claim is the identity of the plaintiff. JC Hauling is a corporation and businesses lack interests in seclusion. It is not just that they are "open for business" and thus, welcome phone calls and other means to alert them to profitable opportunities. It is that corporations are not alive. Where does a corporation go when it just wants to be left alone?[153]

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(14) Businesses also have complained to the Congress and the Federal Communications Commission that automated or recorded telephone calls are a nuisance, are an invasion of privacy, and interfere with interstate commerce.

(15) The Federal Communications Commission should consider adopting reasonable restrictions on automated or pre-recorded calls to businesses, as well as the home consistent with the constitutional protection of speech.

151 *FCC v. AT&T*, 562 U.S. 397, 409-410 (2011) ("personal privacy" does not apply to corporations).

152 392 F.3d 939, 942 (7th Cir. 2004).

153 *Id*.

Judge Easterbrook added, "our point is not that business entities lack interests protected by 227(b)(1)(C), but that it does not help to call them privacy interests."[154]

In addition, it is worthwhile to consider what happens to an e-fax when it is received in today's world. First, like any other e-mail, it is likely to be filtered by a spam filter. Statistics from DMR indicates that 31- 50 percent of all e-mails are stopped by a spam filter. It should be noted that many of the emails are to customers who have made previous purchases. In North America, the overall open rate is 34.1% -- again for all e-mails, which suggests that the open rate is even lower for unsolicited advertising. These statistics certainly demonstrate that even if the time spent reviewing an e-mail or e-fax was recognized as a sufficient harm, proof as to whether the recipient ever actually looked at the advertisement would vary by individual transaction and would have to be resolved on an individual basis.

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As stated above, there is no substantial governmental interest that has been offered or can be offered justifying the restriction on speech imposed by an interpretation of the TCPA that includes e-faxes and facsimile messages received by an online fax server. As a result, any such conclusion by the FCC in response to AmeriFactors' Petition would be in violation of the First Amendment.

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154 *Id.* at 942.

B. Application of the TCPA to E-faxes does not Directly Advance any Asserted Interest

Even if there was arguably some substantial interest supporting the application of Section 227(b)(1)(C) to facsimiles received via online fax service, the prohibition found in the TCPA does not directly advance that interest.

First, the application of the TCPA to facsimile messages sent to online fax servers is unconstitutionally over-inclusive because it sweeps far beyond the concerns that motivated its passage. Application of the TCPA to documents that are never received on a stand-alone facsimile machine subjects the sender of that document to strict liability for conduct that caused none of the harms the TCPA was intended to prevent. The TCPA was Congress's response to a perceived abuse caused by unsolicited facsimiles which shifted the costs of the unwanted advertising to the recipient who had no control over whether the fax would automatically print or tie up its phone line.[155] Application of the TCPA to e-faxes, which do not result in automatic printing or a tying up of the phone line, targets messages well outside the scope of Congress's concern.

Second, the application of the TCPA to facsimile messages sent to online fax services is also unconstitutionally under-inclusive. The U.S. Supreme Court has struck down several arrangements at least in part because they were unconstitutionally under-inclusive. In one case in *City of Cincinnati v. Discovery Network, Inc.*, an advertising magazine sued the City of Cincinnati because it prohibited, in the interests of aesthetics and sidewalk safety, the distribution of commercial handbills in news racks but permitted the distribution of non-

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155 H.R. Rep. No. 317, 102d Cong., 1st Sess. 11 (1991).

commercial handbills.[156] The Court held that "the distinction [between commercial and non-commercial publications] bears no relationship whatsoever to the particular interests that the city has asserted."[157] The decision made it clear that, absent "some basis for distinguishing between [non-commercial] newspapers and commercial handbills that is relevant to an interest asserted by the city," Cincinnati could not rely on either the lower value of commercial speech for First Amendment purposes or the mere fact that by banning one kind of news rack it was advancing its interest because, of course, there would be fewer news racks.[158] In other words, *Central Hudson* requires a logical connection between the interest advanced by a law limiting commercial speech and the exceptions a law makes to its own application.

In *Rubin v. Coors* Brewing *Co.*, the Supreme Court considered the effect of conflicting federal policies on the Government's claim that a speech restriction materially advanced its interest in preventing so-called "strength wars" among competing sellers of certain alcoholic beverages.[159] The Supreme Court held that the effect of the challenged restriction on commercial speech had to be evaluated in the context of the entire regulatory scheme, rather than in isolation.[160] The Court invalidated the regulation at issue based on the "overall irrationality of

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156 *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424 (1993).

157 *Id.* at 424.

158 *Id.* at 428 (internal quotation marks omitted).

159 514 U.S. at 488.

160 *Id.*

the Government's regulatory scheme."[161] The Court found there was "little chance" that the speech restriction could have directly and materially advanced its aim, "while other provisions of the same Act directly undermine[d] and counteract[ed] its effects."[162] Ultimately, the Court found the government could not satisfy the *Central Hudson* test.[163]

And, in Greater *New Orleans*, the Supreme Court clarified the meaning of unconstitutional under-inclusivity. The Court struck down a federal law which banned broadcast advertising for most private casinos but exempted, among others, advertising for Indian tribal casinos.[164] The Court found that "there was little chance that the speech restriction could have directly and materially advanced its aim" – "minimizing casino gambling and its social costs" – because its exemptions defeated its purpose.[165] Seemingly crucial to the Court's conclusion was that forbidding one type of advertising but not another similar type "would merely channel gamblers to one casino rather than another."[166] Since the government in *Greater New Orleans* failed to convince the Court that tribal casino gambling was any less problematic than private casino gambling, such mere redistribution of gamblers was a fatal inefficacy.

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161 *Id.*

162 *Id.* at 489.

163 *Id.* at 490-91.

164 527 U.S. at 195-96.

165 *Id.* at 193.

166 *Id.* at 189.

Thus, under Supreme Court precedent, regulations are unconstitutionally under-inclusive when they contain exceptions that bar one source of a given harm while specifically exempting another in at least two situations. First, if the exception "ensures that the [regulation] will fail to achieve [its] end," it does not "materially advance its aim."[167] Second, exceptions that make distinctions among different kinds of speech must relate to the interest the government seeks to advance.[168]

Section 227(b)(1)(C) is massively under-inclusive as applied to e-faxes because if the time spent reviewing the facsimile message in an e-mail inbox was sufficient enough to justify the speech restriction, then the fact that other unwanted e-mails are not regulated by the TCPA and go unpunished demonstrates that this "is wildly under inclusive . . . which . . . is alone enough to defeat it."[169] Indeed, there is abundant evidence that unwanted commercial e-mails are prolific and raise *much more pervasive* concerns than e-faxes.[170] In fact, in the findings supporting the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM), Congress found that:

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167 *Rubin*, 514 U.S. at 489; *Greater New Orleans*, 527 U.S. at 190 ("The operation of [the regulation] . . . is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it.")

168 *Discovery Network*, 507 U.S. at 418-19) (noting the "minimal impact" the regulation would achieve as a result of the exception).

169 *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 802 (2011).

170 *Reed*, 135 S. Ct. at 2231 ("The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while . . . allowing . . . other types of signs that *create the same problem."* (emphasis added)); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267 (11th Cir. 2005) (invalidating restriction, as exempt speech was "equally" harmful as restricted speech).

> The growth in unsolicited commercial electronic mail imposes significant monetary costs on providers of Internet access services, businesses, and educational and nonprofit institutional that carry and receive such mail, as there is a finite volume of mail that such providers, business, and institutions can handle without further investment in infrastructure.[171]

Yet, unsolicited *e-mail* advertisements or junk mail are not covered by the TCPA and are regulated in a significantly less burdensome manner under the CAN-SPAM Act, with no private cause of action for the recipient.[172] This fact demonstrates that to the extent there is a substantial interest in regulating facsimile messages that are received as an e-mail message, the TCPA is wildly under-inclusive because it does not also cover unwanted e-mails.

More generally, the Supreme Court's under-inclusiveness cases from a variety of factual contexts – applying both strict and intermediate scrutiny – confirm that Section 227(b)(1)(C) fails the narrow-tailoring analysis. For example, in *Republican Party of Minnesota v. White,* the Court concluded that restrictions on judicial candidates' discussion of legal issues during their candidacy (but not before or thereafter) failed under strict scrutiny absent any evidence that "campaign statements are uniquely destructive of [perceptions of] open-mindedness."[173] The Court found that those restrictions were "so woefully under inclusive as to render belief in that purpose [of promoting 'open-mindedness'] a challenge to the credulous."[174] And in *Brown v. Entertainment Merchants Ass'n*, the Supreme Court invalidated a state law

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171 15 U.S.C. § 7701(a)(6).

172 *2003 TCPA Report and Order*, ¶ 200; 15 U.S.C. § 7701 *et seq.*

173 536 U.S. 765, 780-81 (2002).

174 *Id.* at 801.

restricting the sale of violent video games, but not other forms of violent media, as "wildly under inclusive when judged against" the state's compelling interest in protecting children from violent content.[175]

In fact, noting the incoherence and ineffectiveness of selective content-based restrictions affecting the use of dialer technology, courts have recently found that similarly under-inclusive state-level restrictions on "robo-calls" failed to withstand strict scrutiny on this very basis.[176]

The problem with the pronouncements of the FCC that supporters of regulating e-faxes cite is that it necessarily makes the TCPA under-inclusive. The TCPA as interpreted has no hope of stemming those perceived harms when unsolicited e-mails go completely unregulated unless they contain misleading content. And, if the harms the government recites are real then the restrictions will not in fact alleviate the harm to a material degree.[177] If the "nuisance" is

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175 564 U.S. at 802 ("California has singled out the purveyors of video games for disfavored treatment – at least when compared to booksellers, cartoonists, and movie producers – and has given no persuasive reason" for the *distinction*).

176 *See Cahaly v. Larosa,* 796 F.3d 399, 406 (4th Cir. 2015) (invalidating application of South Carolina robo-calling statute under strict scrutiny because "the statute suffers from under inclusiveness because it restricts two types of robocalls – political and consumer – but permits 'unlimited proliferation' of all other types"); *Gresham v. Rutledge,* 198 F. Supp. 3d 965, 969-73 (E.D. Ark. 2016) ("If the interests of privacy and safety warrant restriction of automated calls made for a commercial purpose or in connection with a political campaign, they also warrant restriction of other types of automated calls.")

177 *Id.* at 770-71.

defined as the time it takes to open an e-mail and junk mail, then a ban on e-faxes only could not be justifiable because such a ban would include only a small percentage of such nuisances.[178]

And, the TCPA cannot be saved by including e-mails within its reach. Not only would that be inconsistent with Commission policies, there is no justification for such an action that would clearly contradict the statutory language of the TCPA, since regular telephone lines are often not used.[179] Moreover, the alleged "harm" caused by the e-faxes are not only common to all e-mails, but many other commercial advertisements, including junk mail.

Finally, there are numerous less restrictive alternatives for protecting recipients from the automatic printing of unwanted fax advertisements, namely, interpreting the TCPA in the way it was intended -- to only apply to facsimile messages that are received on a traditional facsimile machine.

It is true that the government regulation does not have to resolve the entire problem. However, its "burden is not satisfied by mere speculation or conjecture." The government must "demonstrate that the harm it receives is real.[180] The time it takes to read the

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178 The 2016 DMA Statistical Fact Book lists email and direct mail as the types of medium used most commonly for promotion email was 83 in 2012 and 82 in 2015. Direct mail was 79% in 2012 and 79.8% in 2015 faxing was not listed. *See* DMA Statistical Fact Book, 4 (*See* **Exhibit D**).

179 In central Florida for example, there is a major trunk of fiber-optic cable that runs along Interstate 4. Many residences and businesses receive their signal from sophisticated fiber-optic cables that cannot cause the type of interference that raised the concerns in 1991 – a previous millennium.

180 *Edenfield,* 507 U.S. at 768.

subject line or read enough of an advertisement to decide you are not interested, cannot justify such a restriction on speech.

Because the justification that the time it takes to review and/or discard a facsimile is an insufficient basis to support restrictions on faxes or emails, the statute is also wildly over-inclusive. As interpreted by the *WestFax Order*, it would to include all types of nonconventional "faxes" such as e-faxes that do not automatically print the communication or tie-up telephone lines. Faxes that are delivered to a computer cause none of the harms the statute was intended to prevent so their inclusion is over-inclusive. This type of over-inclusion is particularly unfair because it subjects the sender to huge exposure, even when no cognizable injury occurs in a substantial percentage of the transaction. The lack of aggregate harm caused e-faxes and similar non-conventional faxes demonstrates that their inclusion under the act violates the statutory language of the act and the First Amendment. Nor can the statute be arbitrarily expanded beyond its clear language and purpose in order to facilitate class actions. The legislative history of the act in both 1991 and 2005 include no reference to Rule 23, or class actions. AmeriFactors does not argue that the class action rule is inapplicable – only that the rules should not be bent to facilitate a mechanism that was not considered by Congress. To the contrary, the legislative history shows that Congress anticipated small claim court enforcement based on Congress' judgment that a $500 minimum recovery – even without actual damages – was a sufficient incentive for enforcement.

VI. CONCLUSION

The core problem in sustaining the facsimile portion of the TCPA as to e-faxes and other similar communications is that e-faxes cause none of the harms the TCPA was

intended to prevent. To the extent that courts have supported a justification for the severe statutory penalties based on the review of time to look at an e-mail or an e-fax, those opinions have not provided a sufficient basis to support the constitutionality of the statute. The "inconvenience" of reviewing e-mails, junk mail, and even outdoor signs, is the same. The only way to ensure the constitutionality of the TCPA is to include only those forms of communications that actually interfere with regular telephone lines, tie-up a facsimile machine, or shift advertising costs by the automatic indiscriminate printing of the message. Otherwise the TCPA fax provision becomes hopelessly overbroad, punishing parties who do not cause the harm that Congress sought to proscribe under a statute that excludes computers as a relevant device from the receiving end. This point is critical because the obvious alternative of excluding e-faxes will not restrict speech nearly as much, and yet, will accomplish the legitimate interest of government, as well. Fortunately, the FCC has the power and responsibility to make this correction, and by doing so, conform its policy to the statutory distinction Congress recognize between a computer and a telephone facsimile machine on the receiving end.

Under the Hobbs Act,[181] the only way a defendant can challenge the validity of or seek a change to the FCC's policy position is by filing a petition with the agency. Unlike the courts, the Commission has the responsibility to promulgate new rules and enter new orders that are consistent with current technology and market conditions. There is no better place to start than with the Commission's position in the 2015 Westfax Order, potentially treating e-faxes and

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181 28 U.S.C. 2341 *et seq.* The Hobbs Act does not preclude constitutional challenges. *See Am. Ass'n of Political Consultants v. FCC*, Case No. 18-1588, 2019 WL 1780961 (4th Cir. 2019).

other similar communications as conventional faxes, despite the statutory language to the contrary, and the total lack of the type of injuries that the statute was intended to prevent.

Respectfully submitted,

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June 13, 2019

4844-0320-5525v.8

EXHIBIT A

FEDERAL COMMUNICATIONS COMMISSION
Enforcement Bureau
445 12th Street, S.W.
Washington, DC 20554

REPORT ON UNSOLICITED FACSIMILE ADVERTISEMENTS

EB-TCD-18-00026339

MAY 2, 2018

Pursuant to the Junk Fax Prevention Act of 2005,[1] this report provides data regarding complaints received and enforcement activities undertaken by the Federal Communications Commission (FCC or Commission) from May 1, 2017, through April 30, 2018, with respect to unsolicited facsimile advertisements, often referred to as "junk faxes."

In 1991, Congress enacted the Telephone Consumer Protection Act (TCPA)[2] to add Section 227 to the Communications Act of 1934 (Communications Act). In addition to addressing unsolicited telemarketing and robocalls, this section prohibits the use of any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.[3] In 2005, Congress enacted the Junk Fax Prevention Act to amend Section 227 by adding an exception to the prohibition to allow fax advertisements to be sent in cases where the sender has an established business relationship with the recipient.[4]

The Junk Fax Prevention Act requires the Commission to provide certain information to Congress periodically about the agency's junk fax enforcement activities.[5] The attached appendix sets forth our current report of the required information and shows that between May 1, 2017, and April 30, 2018, the Commission rejected a petition for reconsideration of a 2016 forfeiture order that imposed a monetary forfeiture of $1.84 million against a junk faxer whose unsolicited advertisements disrupted business activities and patient care at numerous health care offices.[6]

The Communications Act prescribes the type and sequence of actions that the Commission may take against those sending unsolicited facsimile advertisements. For an entity—such as most senders of junk faxes—that does not hold, or is not an applicant for, a

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[1] Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005).
[2] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991).
[3] 47 U.S.C. § 227(b)(1)(C). Section 64.1200(a)(4) of the Commission's rules implements restrictions on the delivery of unsolicited advertisements to telephone facsimile machines. *See* 47 CFR § 64.1200(a)(4).
[4] Junk Fax Prevention Act, sec. 2(a). *See also* 47 CFR § 64.1200(f)(6) (defining an "established business relationship").
[5] Junk Fax Prevention Act, sec. 3; 47 U.S.C. § 227(g).
[6] *Scott Malcolm, DSM Supply, LLC, Somaticare, LLC*, Order on Reconsideration, FCC 18-14 (Feb. 15, 2018).

license or other authorization issued by the Commission (and is not engaged in activities for which an authorization is necessary), the Communications Act requires that the Commission issue a "citation" before proposing a penalty. The purpose of the citation is to alert the sender that sending a junk fax is illegal, and to warn that a future violation could lead to a civil forfeiture.

If the Commission finds that a cited party appears to have engaged in a subsequent junk fax violation, Section 503 of the Act authorizes the Commission to propose a forfeiture penalty, with a current upper limit of $19,639 per violation for entities that do not hold, or are not applicants for, a Commission license or authorization.[7] The specific amount of the proposed forfeiture against a particular violator depends on the application of certain factors set forth in the Communications Act and the Commission's rules.[8] The Commission must set forth the proposed monetary forfeiture in a Notice of Apparent Liability for Forfeiture (NAL) that describes the violation and the underlying facts. By statute, the alleged violator has an opportunity either to pay the forfeiture or to argue for a reduction or rescission of the forfeiture. If the subject of an NAL argues against the forfeiture proposed, the Commission considers the arguments raised and then issues an order either upholding all or part of the forfeiture proposed, or rescinding it. If the subject of a forfeiture order fails to pay the final forfeiture, the Communications Act requires the Commission to refer the matter to the U.S. Department of Justice (DOJ) to enforce the order for the payment of money. DOJ must file a complaint in federal district court seeking a trial *de novo* (i.e., a trial where the court considers the underlying facts anew). DOJ, therefore, makes the final decision on whether to enforce the forfeiture.

Over the past several years, the number of junk fax complaints received by the Commission has dropped dramatically. Annual complaint totals have declined by more than 90 percent from the high levels reported for 2006 to 2009. The decline in fax complaints follows in lockstep with Americans' shift away from fax transmission to other forms of document sharing via the Internet; some estimate that as few as 3 percent of American households have a device capable of receiving faxes. Moreover, as Americans abandon landline telephone service for wireless-only service, consumer use of fax machines will probably continue to decline.

With respect to TCPA enforcement (which includes not only junk fax cases, but also do-not-call, unwanted texts, and robocall cases), the Enforcement Bureau selects its cases strategically by focusing on the cases that affect large numbers of American consumers, or that

---

[7] The Communications Act specifies a maximum forfeiture in such cases of $10,000, subject to periodic adjustments for inflation. 47 U.S.C. § 503(b)(2)(D). The current adjusted maximum is $19,639. *Amendment of Section 1.80(b) of the Commission's Rules: Adjustment of Civil Monetary Penalties to Reflect Inflation*, Order, 33 FCC Rcd 46 (EB 2018).

[8] Section 503(b)(2)(E) of the Communications Act states that "[i]n determining the amount of such a forfeiture penalty, the Commission or its designee shall take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." 47 U.S.C. § 503(b)(2)(E). The Commission's forfeiture guidelines identify additional criteria the Commission applies to determine whether to apply a higher or lower forfeiture. For example, the Commission may assess a higher forfeiture for egregious misconduct or repeated violations, while it may assess a lower forfeiture for a minor violation or where the violator has a history of overall compliance. 47 CFR § 1.80.

may prevent harms in the first place. In cases of demonstrated consumer harm, the Commission does not hesitate to bring enforcement actions, including assessment of penalties, such as the $1.84 million penalty, referenced above, against a persistent and egregious junk faxer.

We hope this report is informative to Congress. We will continue to collaborate with the Commission's other Bureaus and Offices, and with outside stakeholders, to evaluate our enforcement activities on an ongoing basis in order to maximize our effectiveness in this area.

Submitted by:

Rosemary C. Harold
Chief, Enforcement Bureau

APPENDIX— Data for May 1, 2017 through April 30, 2018

1. Complaints

During this reporting period, the Commission's Consumer and Governmental Affairs Bureau (CGB) received 3124 junk fax complaints, a rate of 260 complaints per month. This continues the steep decline in junk fax complaint receipts, showing a decline of nearly 95 percent from the peak of junk fax complaints during 2007 – 2008. CGB has responded to each consumer who filed a complaint, acknowledging receipt and emphasizing that although the Commission does not adjudicate individual complaints, these filings are crucial to the Commission's efforts to effectively enforce junk fax requirements and protect consumers against unwanted fax advertisements. The Enforcement Bureau reviews complaints to facilitate identification of the most serious violators although positive identification may ultimately not be possible for a number of reasons.

2. Citations, Notices of Apparent Liability for Forfeiture, Consent Decrees, Forfeiture Orders, and Orders on Reconsideration

From May 1, 2017 through April 30, 2018, the Commission dismissed, and in the alternative denied, a petition for reconsideration seeking to overturn or reduce a $1.84 million forfeiture for junk fax violations by an individual whose advertisements for chiropractic equipment disrupted the operations of numerous health care offices.

The Commission did not issue any citations, notices of apparent liability for forfeiture, or forfeiture orders, and did not enter into any consent decrees, during the period covered by this report.

3. Referrals to the Department of Justice of Unpaid Forfeiture Penalties

When the FCC issues a forfeiture order, it generally gives the subject thirty days to pay the penalty. As with any order issued by the Commission, the Communications Act also gives the subject thirty days after the Commission gives public notice of any forfeiture order to seek reconsideration of that order.[9] If the subject neither pays the penalty nor seeks reconsideration, the FCC then, at the request of DOJ as a prerequisite for referral, issues a demand letter, requiring payment within thirty days. If the subject still does not pay the forfeiture, the FCC prepares the pleadings for DOJ to file in court to enforce the forfeiture, and formally refers the matter to DOJ.

The length of time between the FCC's issuance of a forfeiture order and referral to DOJ may be slowed by a number of factors. If the FCC has issued, or foresees that it may issue, more than one forfeiture order against the same subject, it may defer referral of the first order until it has issued the subsequent orders. In addition, the subject of a forfeiture order may express interest in settlement at any point in the process, and consideration and

[9] 47 U.S.C. § 405(a).

negotiation of terms affects referral timing. The Commission typically will not refer a case to DOJ while a petition for reconsideration is pending.

During the reporting period, the Commission referred one unpaid forfeiture penalty for junk fax violations to the Department of Justice for collection. This case, referenced above, seeks collection of a $1.84 million penalty. The Department of Justice filed a complaint on February 21, 2018, and the case is pending before the U.S. District Court for the Northern District of Texas.

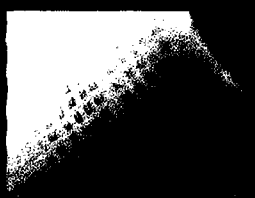
EXHIBIT B

2010

DMA

STATISTICAL FACT BOOK

The Definitive Source for Direct Marketing Benchmarks



30th EDITION

DMA
Direct Marketing Association

PURPOSE OF SEARCH ENGINE MARKETING USE

Statement	All Advertisers	Advertisers of <500 Employees	Advertisers o 500+ Employe
To sell products, services or content directly online	61.0%	63.0%	58.0%
To increase/enhance brand awareness of our products/services	63.0%	58.0%	71.0%
To generate leads that we ourselves will close as sales via another channel	56.0%	54.0%	58.0%
To drive traffic to our ad-supported website	44.0%	42.0%	49.0%
To generate leads for a dealer of distributor network	14.0%	13.0%	17.0%
To provide informational/educational content only	11.0%	8.0%	16.0%
Other	1.0%	1.0%	2.0%

Source: Search Engine Marketing Professional Organization survey of SEM agencies and advertisers, 2009.

WHICH OF THE FOLLOWING DIGITAL MEDIA PLATFORMS ARE YOU CURRENTLY USING?

The first generation of new media – what many refer to as Web 1.0 technologies, such as e-mail, Web sites, ar search engines – still holds the most appeal for marketers. Ninety-nine percent of marketers have their own We sites, 94 percent employ e-mail marketing, and 86 percent tap search engine optimization (SEO) strategies.

	TOTAL	PRIMARILY B-TO-B	PRIMARILY B-TO-C	EQUAL COMBO
Your own Web site	99%	99%	98%	99%
E-mail marketing	94%	94%	99%	94%
Search engine optimization (organic)	86%	79%	92%	92%
Online ads and banners on third-party Web sites	84%	73%	99%	89%
Search engine marketing (paid keyword)	80%	71%	93%	86%
Social networks/social media	66%	57%	70%	72%
Webinars	65%	66%	49%	70%
Viral video	50%	42%	66%	51%
RSS feeds	47%	46%	45%	51%
Blogs	44%	34%	53%	54%
Podcasts	41%	38%	37%	45%
Video on demand	41%	36%	44%	47%
Mobile	32%	18%	52%	34%
Wiki	30%	36%	24%	26%
Gaming	16%	7%	29%	18%
Second Life	9%	6%	14%	8%

Source: ANA (Association of National Advertisers), 2009.

EXHIBIT C

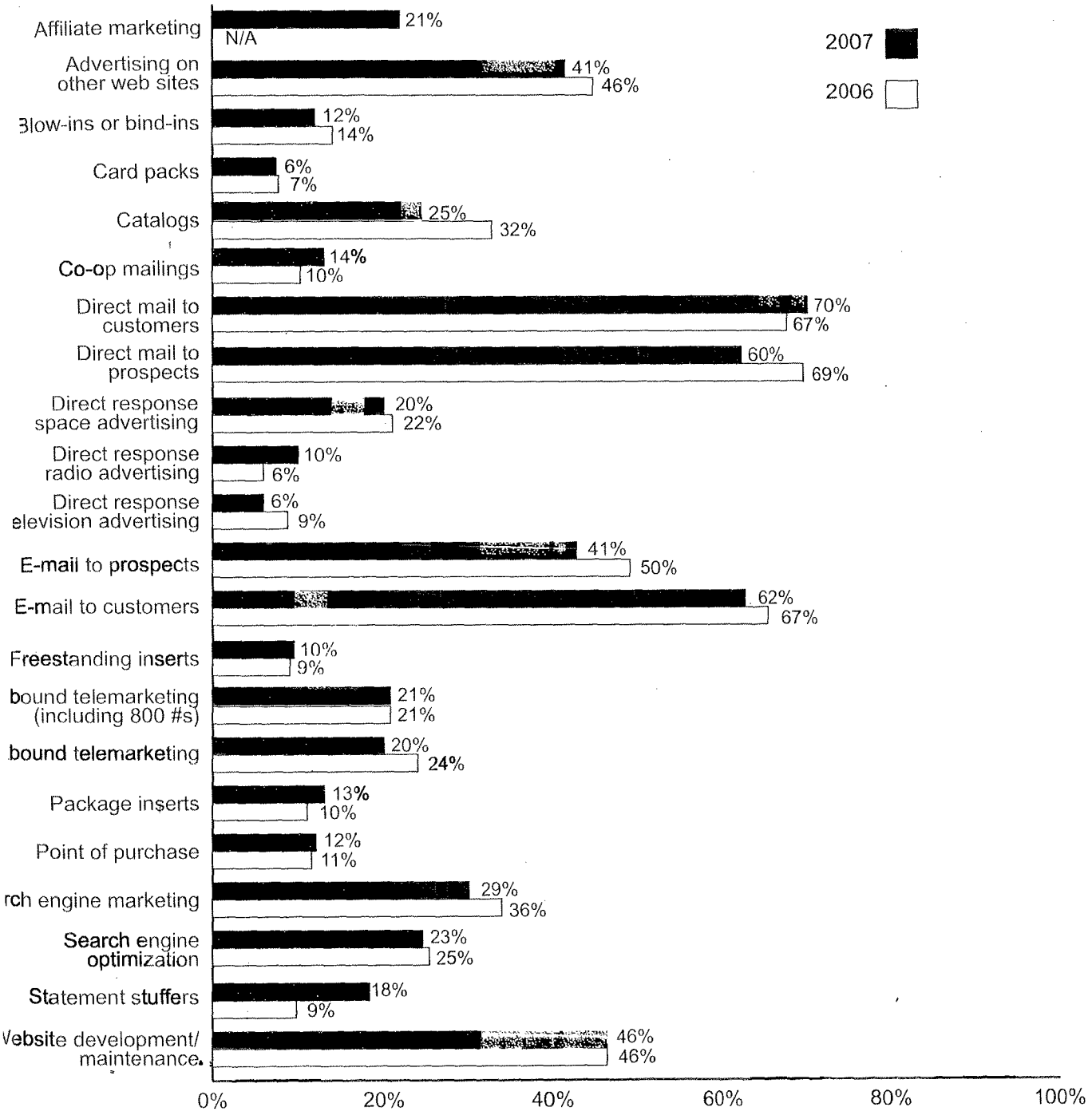
MA Statistical Fact Book, 30th edition
he Definitive Source for Direct Marketing
enchmarks

2008

DMA
Direct Marketing Association
1120 Avenue of the Americas
New York, NY 10036-6700
212.768.7277

:CT MARKETING METHODS USED BY MARKETERS

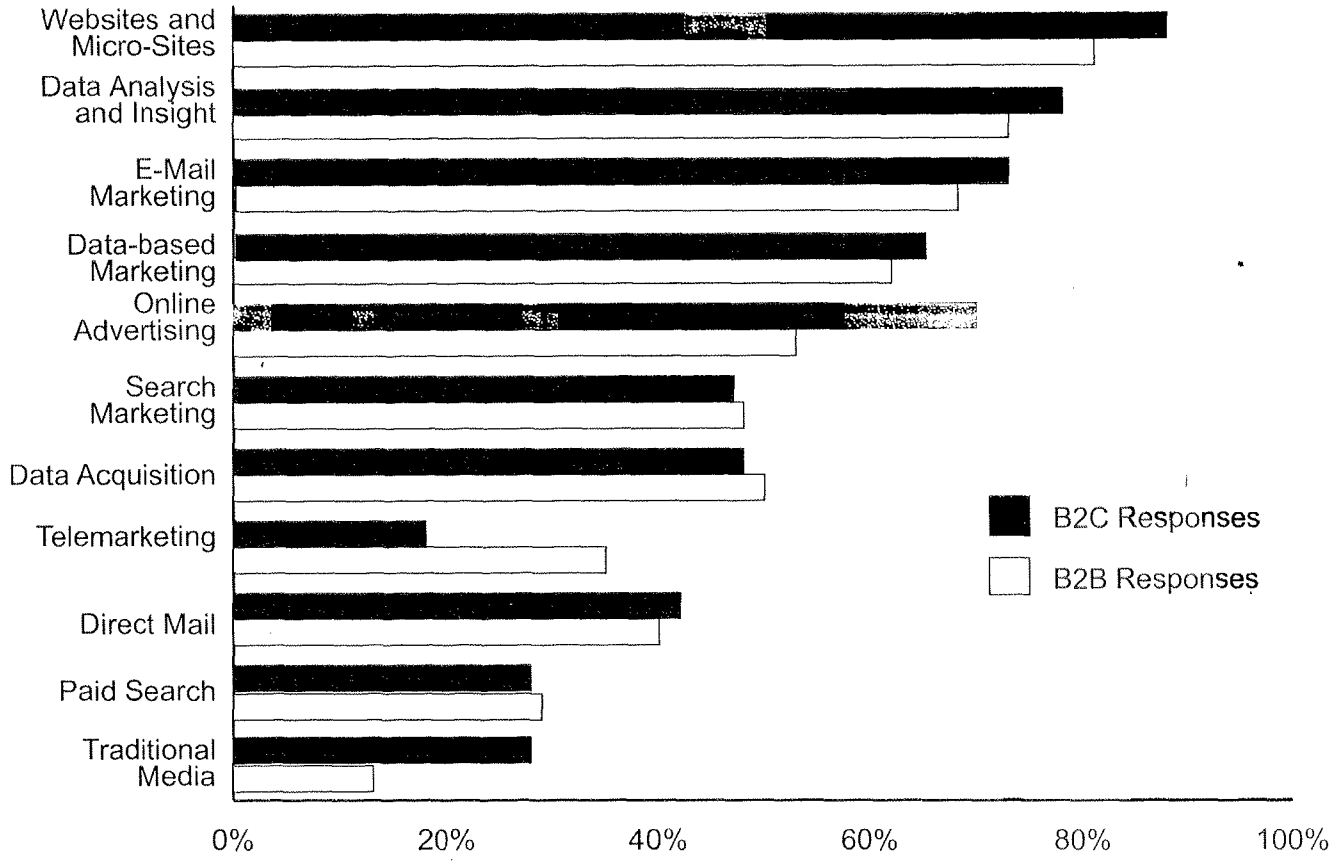
nail (other than catalogs) is still the number one direct marketing method used by marketers.



e: Penton Media, copyright 2007.

WEB-BASED MARKETING IS GAINING IN IMPORTANCE

This year's respondents are stating that "Web" in various forms is increasing in importance.



Source: Harte-Hanks, Inc. -- *Target Marketing Priorities Analysis -- 2007 Key Trends.*

EMERGING MEDIA AND COMMUNICATION CHANNELS

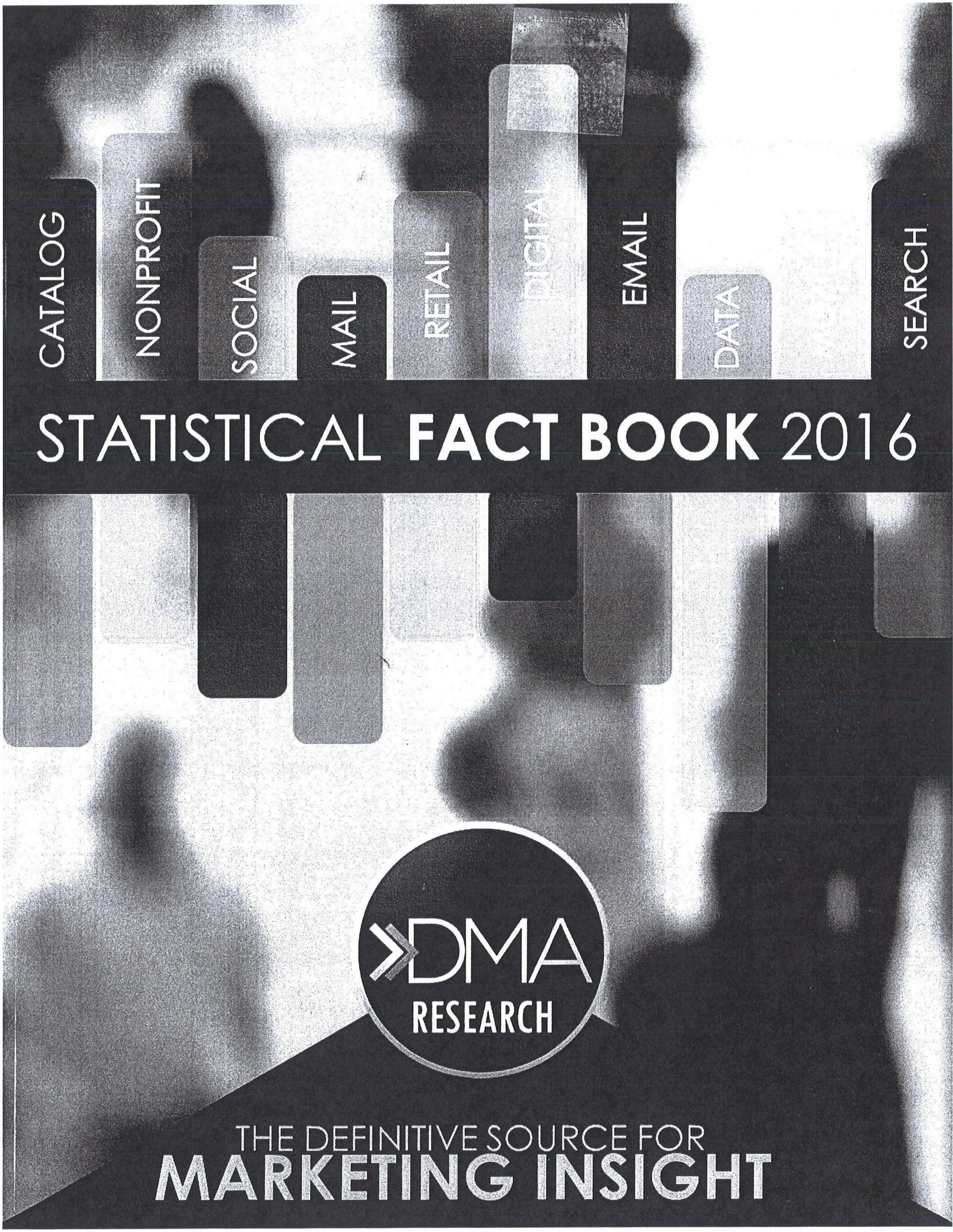
Currently 45% of integrated marketers don't spend on social computing/networking, blogs or other WOM **effots.**

% integrated marketers are interested in incorporating emerging media into their campaigns

Social Computing / Word-of-Mouth	67%
Product Placement	64%
Blogs	55%
Podcasting	54%
Mobile	48%
RSS	44%
Interactive TV	39%
Instant Messenger	31%

Source: Epsilon, *Insight* brief: "Measuring Success," October 2007.

EXHIBIT D

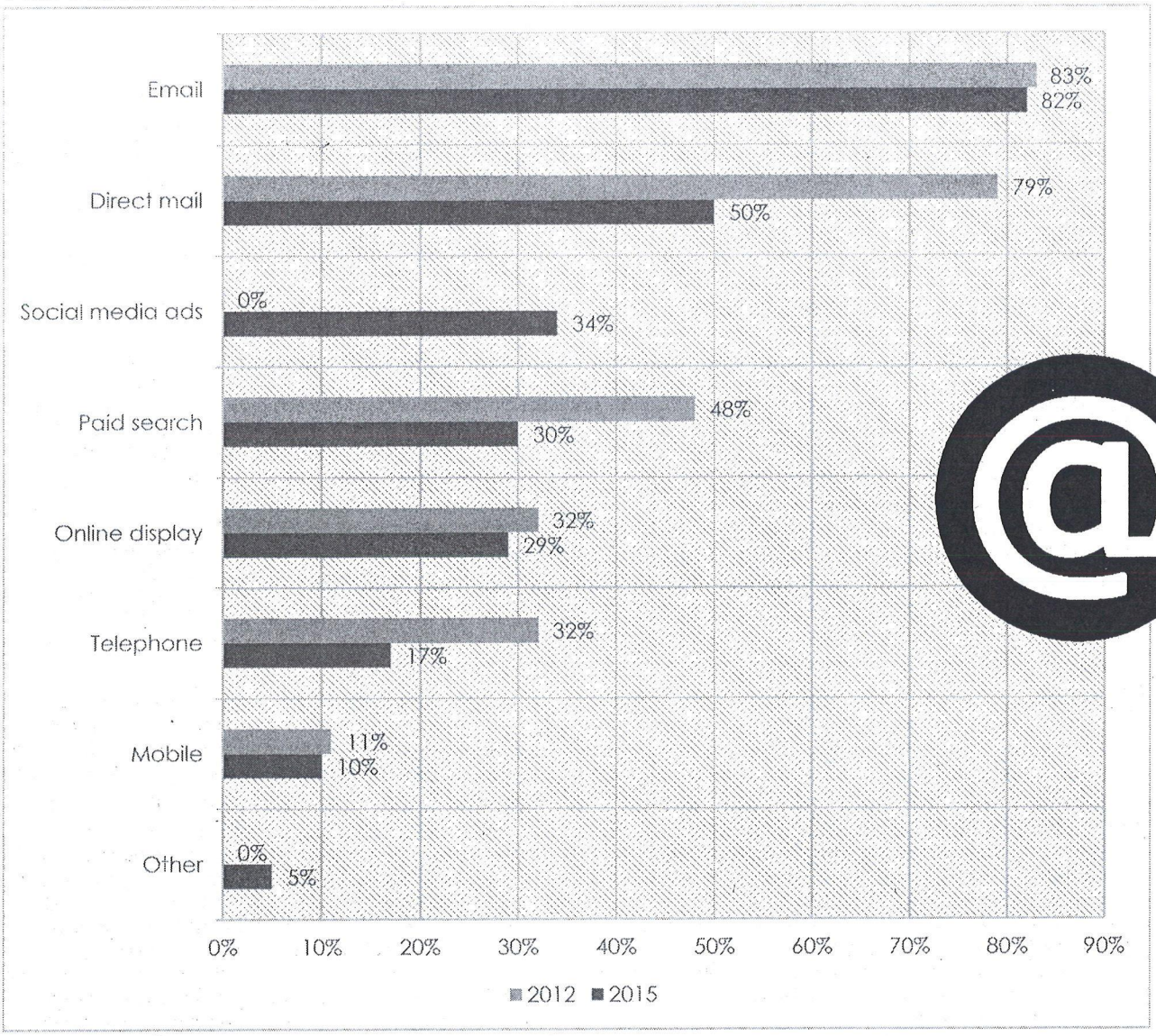


STATISTICAL **FACT BOOK** 2016

DMA RESEARCH

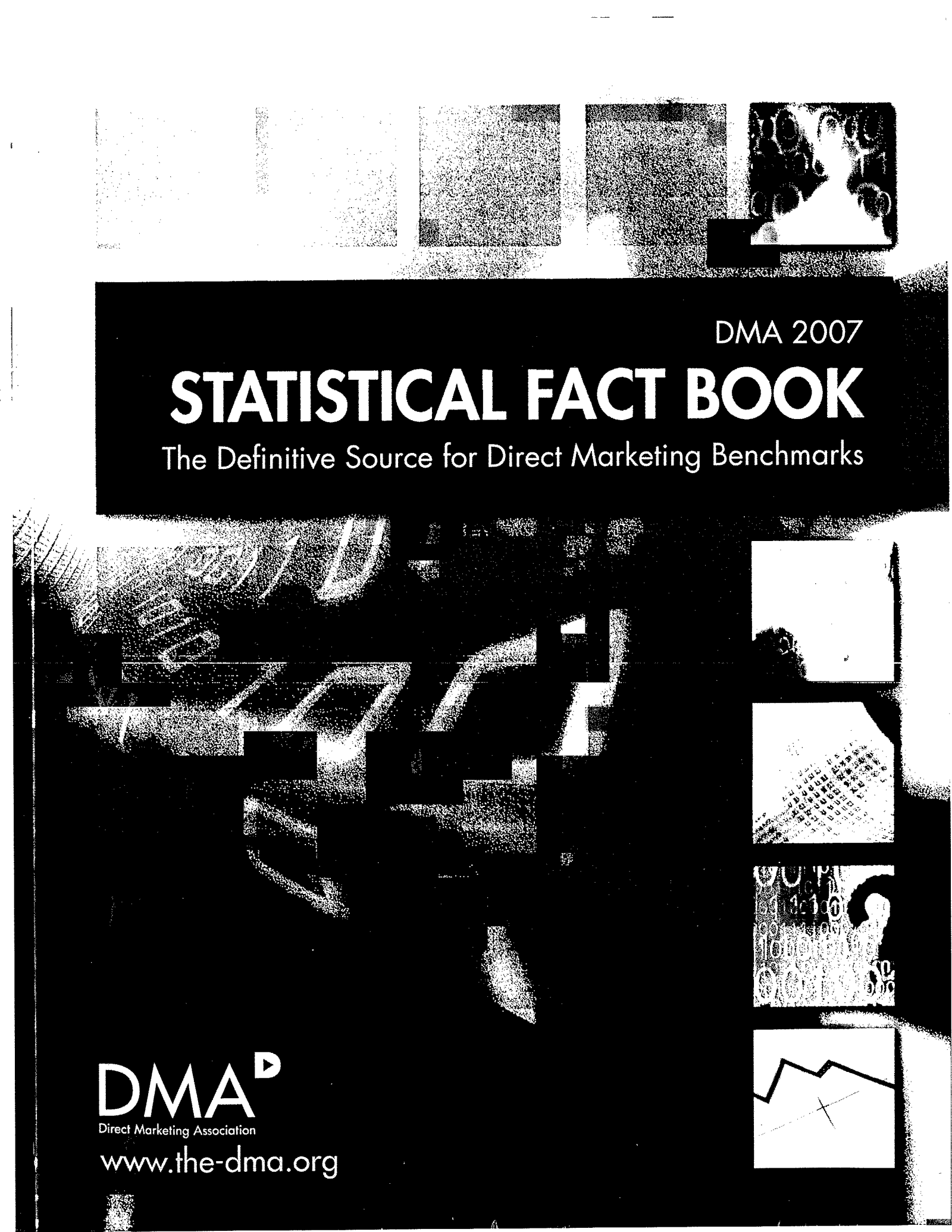
THE DEFINITIVE SOURCE FOR
MARKETING INSIGHT

PERCENTAGE USING EACH MEDIUM IN PROMOTIONAL CAMPAIGNS



Source: 2015 Response Rate Report, DMA & Demand Metric.

EXHIBIT E



DMA 2007

STATISTICAL FACT BOOK

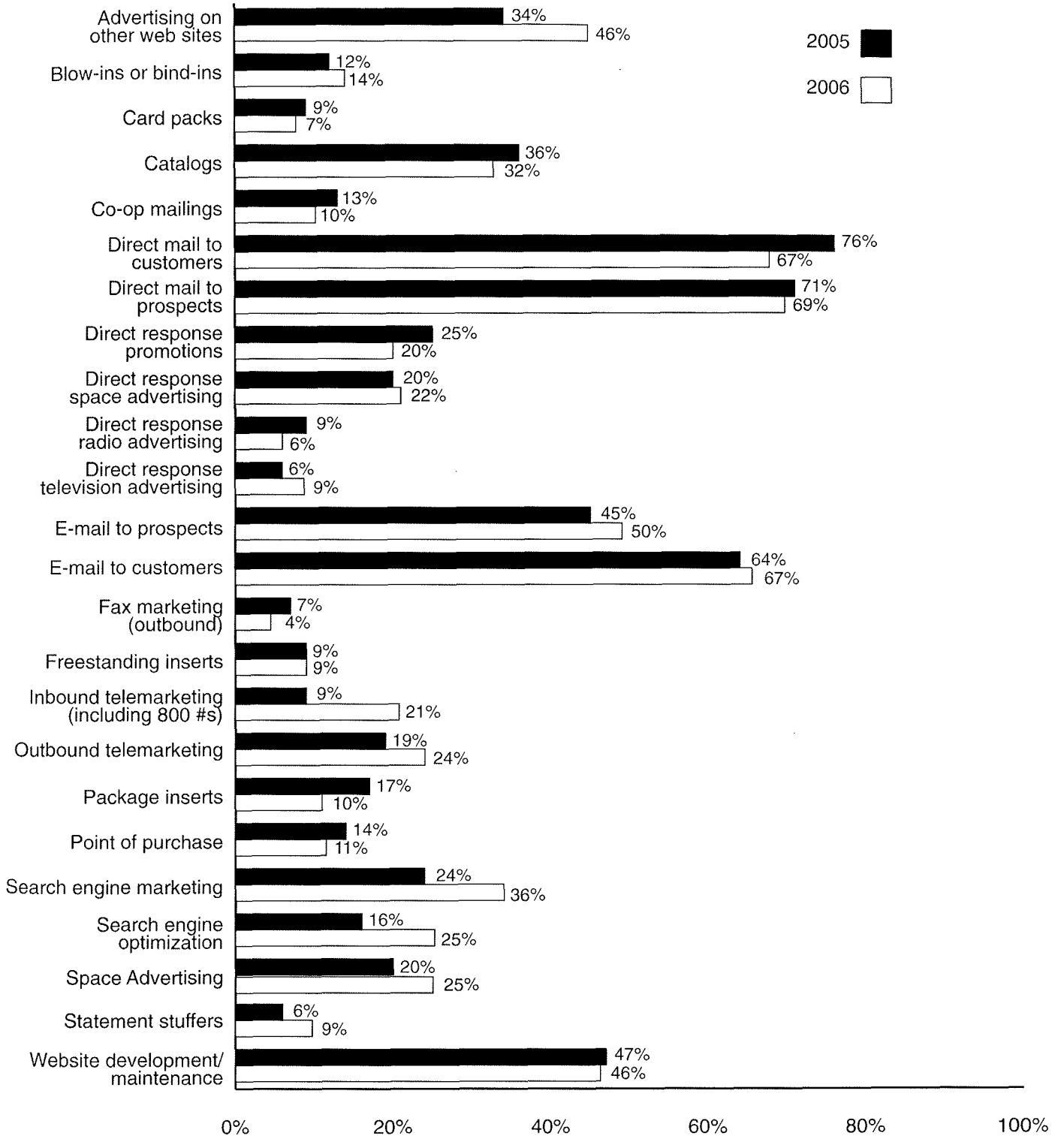
The Definitive Source for Direct Marketing Benchmarks

DMA
Direct Marketing Association

www.the-dma.org

DIRECT MARKETING METHODS USED BY MARKETERS

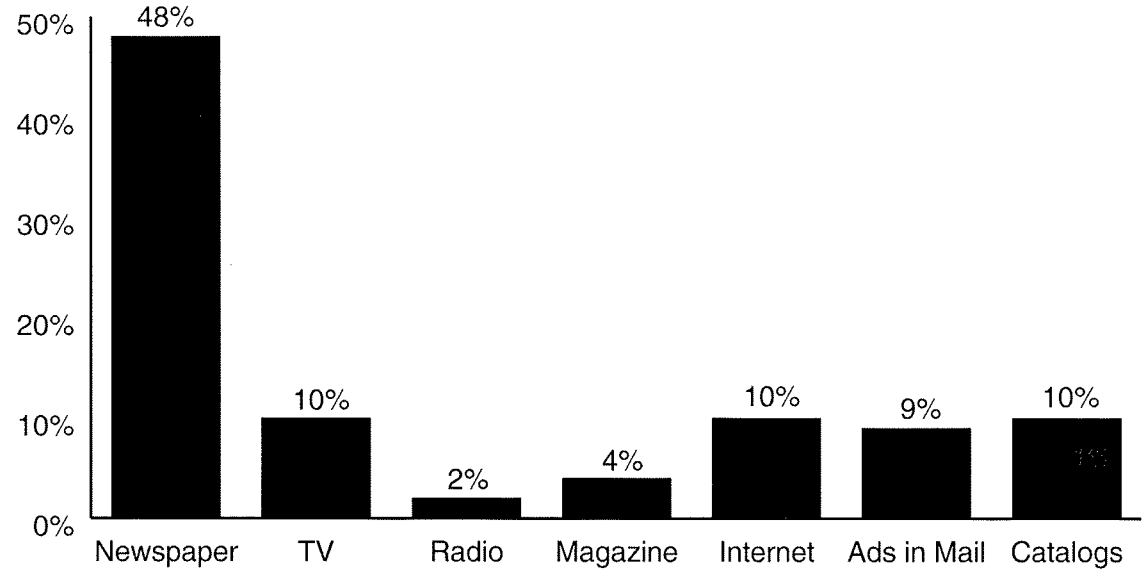
Direct mail (other than catalogs) is still the number one direct marketing method used by marketers.



Source: Primedia Intertec, copyright 2006.

MOST BELIEVABLE AND TRUSTWORTHY ADVERTISING

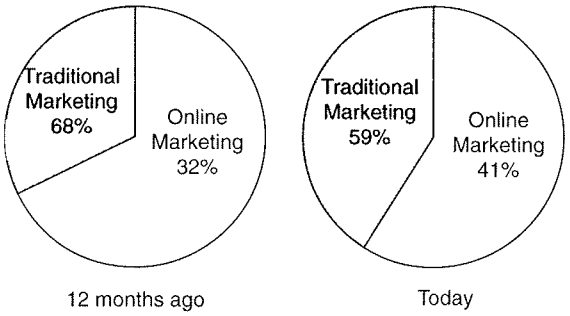
When it comes to media *credibility*, more consumers consider newspaper advertising the most believable and trustworthy.



Source: Attitudes Toward Media Advertising 2006, NAA. How America Shops and Spends 2006, NAA. Prepared by MORI Research.

CHANGES IN ONLINE VS. TRADITIONAL MARKETING BUDGETS

(Among companies that shifted their marketing budget mix)

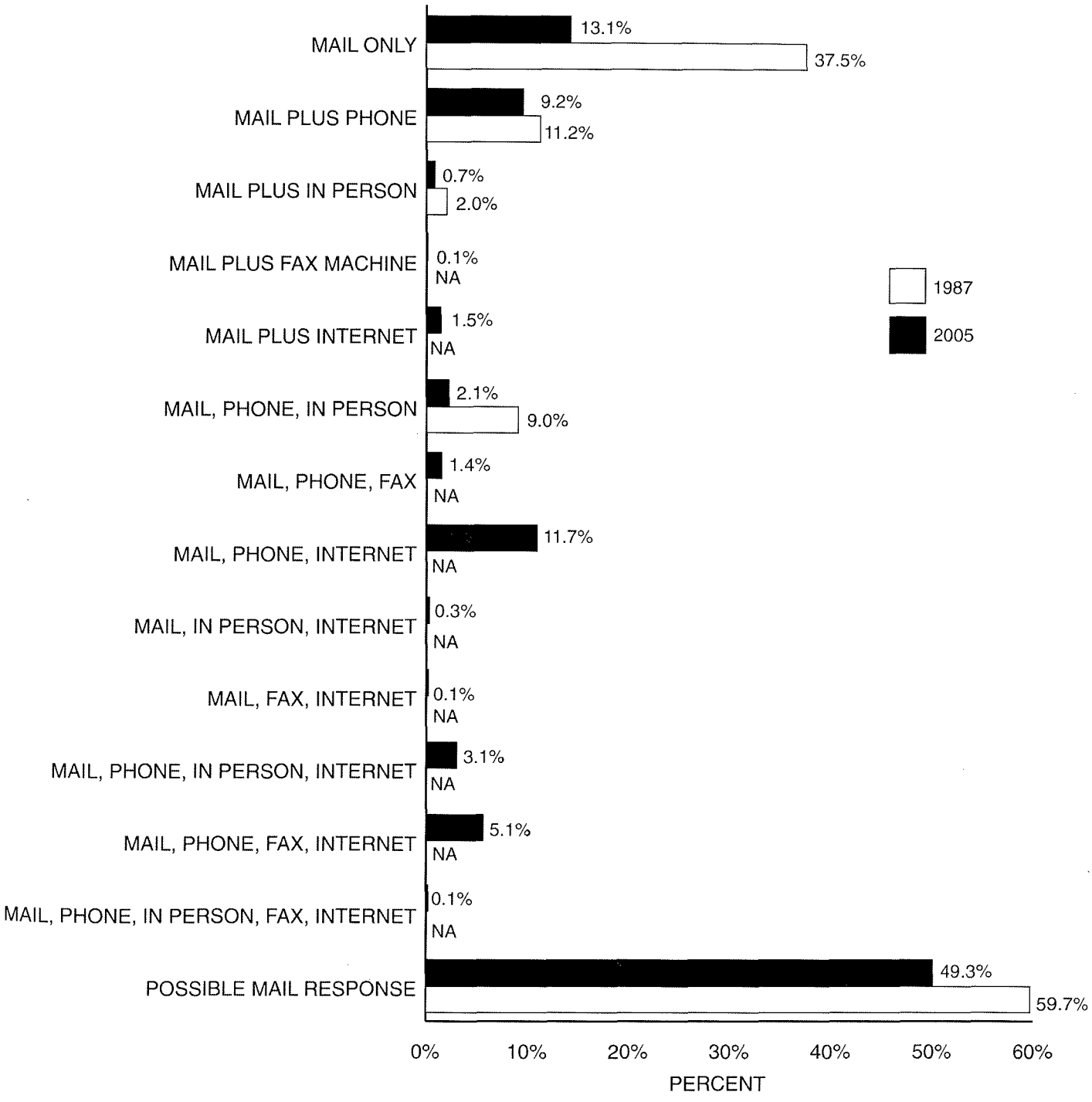


Source: Capell's Circulation Report's Industry Survey, 2006.

AVAILABLE RESPONSE MEDIA FOR STANDARD MAIL (A) OFFERS

POSTAL YEARS 1987 AND 2005 (PERCENTAGE OF PIECES)

Mail is used as a response device in the majority of offers.



(CONTINUED)

WHICH OF THE FOLLOWING MAKES A DIFFERENCE AS TO WHAT DIRECT MAIL YOU OPEN?

Consumers respond best to timely, relevant information catered to meet their specific needs.

	2001	2006
Timing of the piece arriving and my need for the service	58%	69%
The package looks interesting	48%	63%
My name is on the front of the envelope	58%	59%
A special offer or discount	34%	51%
The package looks important	37%	49%
Dated material enclosed	24%	33%

Source: Vertis Customer Focus, 2007.

WHY ADULTS ARE NOT OPENING DIRECT MAIL

Clutter and lack of time are the main reasons why adults are not opening direct mail.

	Total Adults	Adults $30-$75k
Don't trust	7%	7%
Offers are not real	6%	5%
Do not need	14%	17%
No reason	20%	19%

Source: Vertis Customer Focus, 2007.

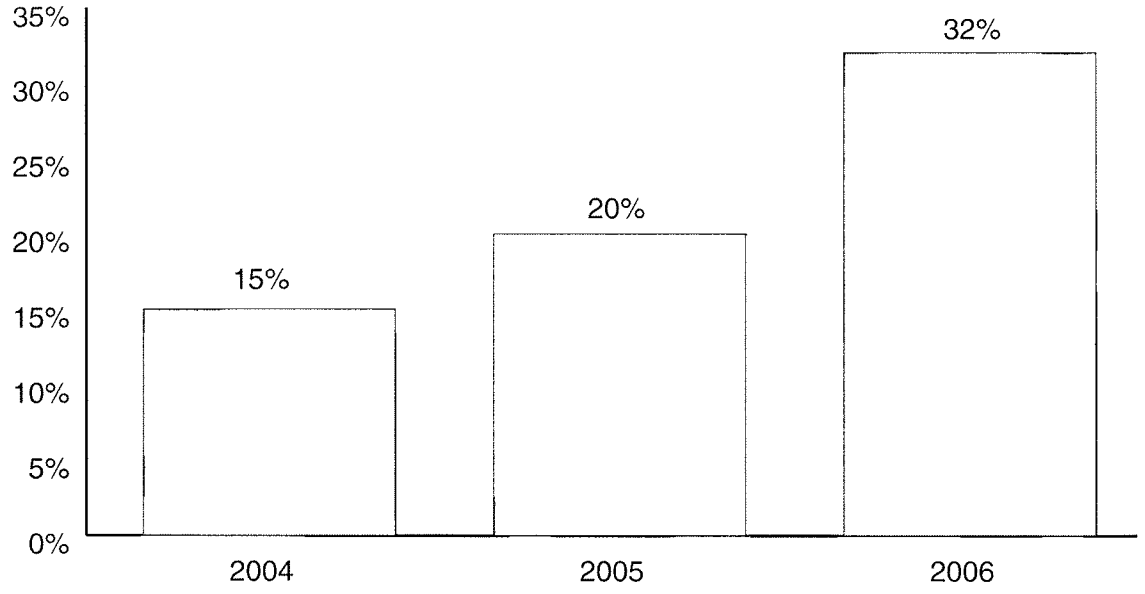
WHEN YOU EXPRESS INTEREST IN A PRODUCT TO A COMPANY, WHICH OF THE FOLLOWING ARE ACCEPTABLE FORMS OF FOLLOW-UP COMMUNICATION TO YOU?

Consumers find personalized direct mail and email to be acceptable follow-up communications.

	Total Adults
Phone	55%
Direct Mail (combined)	55%
Catalog	54%
E-mail (combined)	53%
Direct mail personalized to your needs	48%
E-mail personalized to your needs	45%
Direct mail with general information	33%
E-mail with general information	28%
Personal visit to you	11%
Text message	6%
None of these	7%

Source: Vertis Customer Focus, 2007.

AVERAGE SPENDING ON ONLINE ADVERTISING AS A PROPORTION OF ADVERTISERS' TOTAL MEDIA BUDGET



Source: American Advertising Federation, 2006.

AVERAGE SPENDING OF INDIVIDUAL ADVERTISING METHODS AS A PROPORTION OF TOTAL ONLINE ADVERTISING BUDGET

	2006
Social Media	7%
Online Video	5%
Podcasts	4%
Blogs	2%
Mobile Devices	2%
Advergaming	1%

Source: American Advertising Federation, 2006.

SUMMER 2006 DATABASE MARKETING SURVEY

Background: The survey was mailed to 2,000 DM News subscribers who fell into five business categories: Catalog (Consumer/Retail Outlet); Financial Direct Marketer; Non-Financial Direct Marketer; Packaged Goods Direct Marketer; and Publisher/Subscription Marketer.

Before mailing the surveys, companies were closely examined to ensure they were in fact properly classified. Consulting firms and vendors were eliminated from consideration.

Of the 132 people who responded, 116 qualified for analysis.

MEDIA USAGE FOR PROMOTION OF PRODUCTS AND SERVICES

Web Site (88.6%) and E-mail (78.07%) are the two most used forms of media for promotions of company products and services.

Media	1999	2006
Web Site	77.1%	88.60%
E-mail	0.0%	78.07%
Direct Mail Packages	76.4%	75.44%
Magazine/Newspaper Space Ads	62.5%	61.40%
Outbound Telemarketing	53.5%	48.25%
Direct Mail Catalogs	47.9%	42.98%
Package/Mail Insert Programs	41.7%	48.25%
Free Standing Inserts	31.3%	35.09%
Television/Cable/Radio Ads	29.2%	30.70%
Card Deck Programs	24.3%	19.30%
Co-op Mailers	18.8%	31.58%

Source: Drake Direct, 2006.

DOES YOUR COMPANY CREATE AND USE FROZEN SAMPLES

Over one-third of companies surveyed agreed that they create frozen samples -- a sample representing the customer's characteristics at time of promotion -- for analysis.

	1999	2006
Yes	29.86%	36.21%
No	52.78%	43.10%
Don't Know	17.36%	20.69%

Source: Drake Direct, 2006.

PERFORMING POST ANALYSES AFTER MAILING CAMPAIGNS

Rate the following statement: My company always performs post analyses (an in-depth analysis of a mailing campaign) after each and every mailing campaign (check only one).

Only about 63% of the companies surveyed agreed that they perform post analyses of mailing campaigns.

	1999	2006
Stongly Disagree	5.56%	8.62%
Disagree	15.28%	15.52%
Neither Agree Nor Disagree	11.81%	11.21%
Agree	45.83%	38.79%
Strongly Agree	21.53%	24.14%
Don't Know	0.00%	1.72%

Source: Drake Direct, 2006.

BUSINESS-TO-BUSINESS MEDIA SPENDING

(MILLIONS OF DOLLARS)

Overall b-to-b media expenditures climbed 5.2% to $20.91 billion in 2004, driven by surging e-media spending-the smallest sub-segment-which grew 25.9% to $1.47 billion.

	2004	2005	2006	2007	2008	2009	2010
B-to-B Magazines	$10,290	$10,702	$10,980	$11,273	$11,602	$11,968	$12,362
E-Media	$1,472	$1,869	$2,395	$2,992	$3,626	$4,256	$4,920
Trade Shows & Exhibits	$9,141	$9,714	$10,313	$10,866	$11,512	$12,134	$12,890
Total	**$20,904**	**$22,285**	**$23,688**	**$25,131**	**$26,740**	**$28,358**	**$30,172**

Source: Veronis Suhler Stevenson Communications Industry Forecast,2006.

BUSINESS-TO-BUSINESS DIRECT MARKETING ADVERTISING EXPENDITURES BY MEDIUM

(MILLIONS OF DOLLARS)

Advertising expenditures for business-to-business direct marketing are forecasted to grow by about 5% from 2006-2011.

	2001	2005	2006	2007	2011	Annual Growth Rate 01-06	06-11
Direct Mail (Non-Catalog)	$8.8	$11.7	$12.5	$13.3	$15.9	7.3%	5.0%
Direct Mail (Catalog)	5.6	7.2	7.7	8.1	9.8	6.6%	5.1%
Telephone Marketing	27.1	27.3	27.6	28.0	30.4	0.4%	1.9%
Internet Marketing (Non E-Mail)	3.9	6.8	9.0	10.9	19.1	17.9%	16.4%
Commercial E-Mail	0.1	0.2	0.2	0.3	0.5	12.5%	19.8%
DR Newspaper	5.2	4.6	4.8	4.9	5.4	-1.7%	2.6%
DR Television	7.0	9.2	9.6	10.1	12.4	6.7%	5.1%
DR Magazine	3.7	4.2	4.4	4.5	5.0	3.5%	2.6%
DR Radio	2.1	2.4	2.5	2.5	2.8	3.6%	2.7%
Insert Media	0.2	0.3	0.3	0.3	0.4	7.2%	5.5%
Other	1.0	1.1	1.2	1.2	1.4	2.9%	3.1%
Total	64.6	75.0	79.7	84.2	103.1	4.3%	5.3%

Source: The DMA's The Power of Direct Marketing 2006-2007 Edition.

BUSINESS-TO-BUSINESS DIRECT MARKETING SALES BY MEDIUM

(MILLIONS OF DOLLARS)

Sales for business-to-business direct marketing are forecasted to grow by 6.5% from 2006-2011.

	2001	2005	2006	2007	2011	Annual Growth Rate 01-06	06-11
Direct Mail (Non-Catalog)	$122.2	$166.1	$178.8	$190.3	$231.0	7.9%	5.2%
Direct Mail (Catalog)	36.4	45.7	49.0	51.9	62.1	6.1%	4.8%
Telephone Marketing	204.0	210.5	215.7	220.4	239.5	1.1%	2.1%
Internet Marketing (Non E-Mail)	83.9	145.4	178.0	210.6	352.5	16.2%	14.6%
Commercial E-Mail	5.1	8.8	9.8	11.5	18.6	14.1%	13.6%
DR Newspaper	56.5	66.5	67.5	68.9	72.9	3.6%	1.6%
DR Television	39.7	51.3	53.9	56.3	67.7	6.3%	4.7%
DR Magazine	35.2	40.6	42.4	44.1	48.2	3.8%	2.6%
DR Radio	13.8	16.1	16.5	17.0	18.4	3.7%	2.2%
Insert Media	2.5	3.5	3.7	3.9	4.7	7.5%	5.3%
Other	5.0	5.8	6.0	6.3	7.2	3.7%	3.5%
Total	604.3	760.3	821.4	881.1	1122.8	6.3%	6.5%

Source: The DMA's The Power of Direct Marketing 2006-2007 Edition.

MEDIA USED FOR ADVERTISING (2004-2005)

On average, a company used 4 marketing tools. Search engine registration usage increased from the previous 34.4% to the current 46.4% and became the most used tool, followed by e-mails to customers with 44.0%, e-mail newsletters with 38.6% and banner ads with 38.2%.

Media	2005
Registration to Search Engines	44.8%
E-mailing to Users	44.0%
Text Ad in E-mail Newsletters	38.6%
Banner Ads	38.2%
Affiliate Program	34.9%
Online Malls	34.0%
Traditional Media incl. Magazines	27.4%
Other Web Sites	27.0%
Online Text Ads	21.2%
Registration to Link Directory	16.2%
Mutual Links	13.7%
Mutual Banner Ads	3.7%
No Usage	10.4%
Others	2.9%
Unknown	7.1%

Source: Direct Marketing in Japan, JADMA, 2006.

DIRECT MAIL VOLUMES - 1990 - 2006 (MILLION ITEMS) - UNITED KINGDOM

5,028 million items were mailed in 2006 in the United Kingdom.

	Consumer	Business	Total
1990	1,544	728	2,272
1991	1,435	687	2,122
1992	1,658	588	2,246
1993	1,772	664	2,436
1994	2,015	715	2,730
1995	2,198	707	2,905
1996	2,436	737	3,173
1997	2,700	887	3,588
1998	3,123	891	4,014
1999	3,283	1,062	4,345
2000	3,516	1,148	4,664
2001	3,706	1,233	4,939
2002	3,940	1,293	5,233
2003	4,240	1,198	5,438
2004	4,221	1,197	5,418
2005	4,002	1,132	5,134
2006	3,937	1,091	5,028

Source: Direct Mail Information Service (DMIS), 2007.

CHAPTER HIGHLIGHTS

- First-class and Standard Mail (A) represent almost the same amount of total volume, 45.8% and 48.1% respectively.
- Over the years, First-class mail revenue has been shrinking, while Standard Mail (A) has been growing.
- The total number of pieces of mail attributed to direct mail in 2005 was 105.6 billion.
- More than 50% of all packages were sent via first-class and priority mail in 2005.

EXHIBIT F

22nd edition

direct marketing association's

fact book

Projections

Sales figures

Expenditure data

Media usage

Internet trends

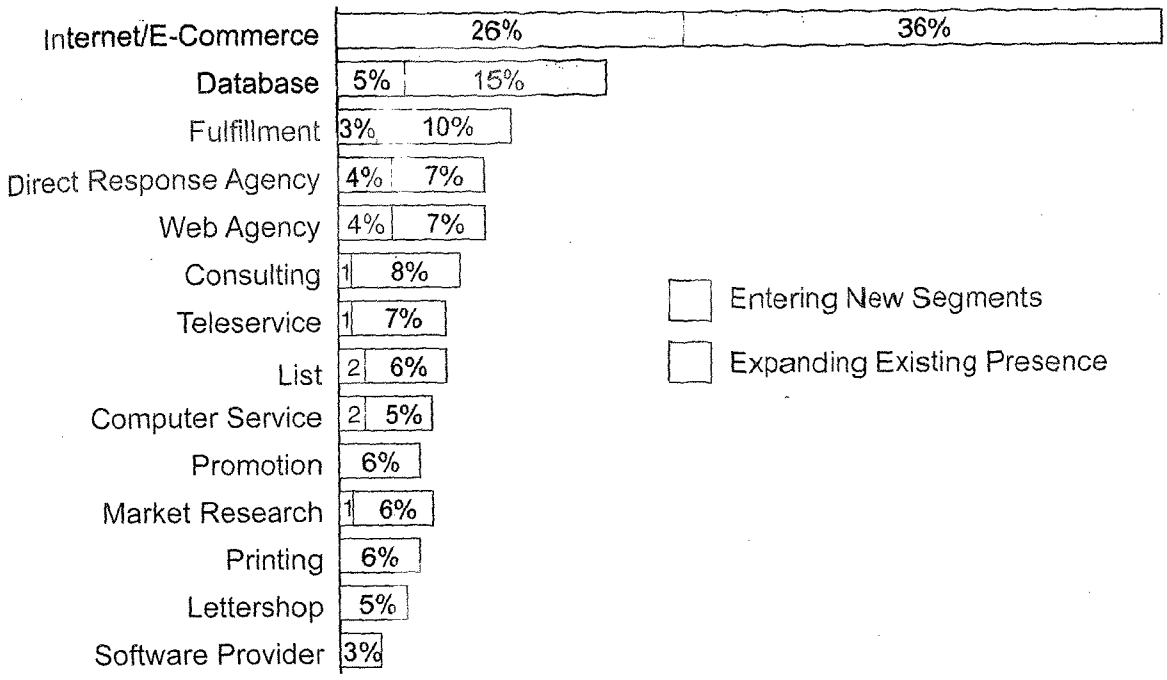
Purchasing habits

THE DMA

Direct Marketing Association

BUSINESS EXPANSION PLANS BY SEGMENT

The information below is taken from Direct Marketing Services Industry Mergers & Acquisitions Outlook — a suvey of CEOs and Senior Executives. Sixty-five percent of survey respondents expect to expand their existing areas of operation or enter new business segments in 1999.



Source: Winterberry Group LLC, 1999.

DIRECT MARKETING SERVICES INDUSTRY 15 LARGEST TRANSACTIONS

JANUARY 1998 - JULY 1999

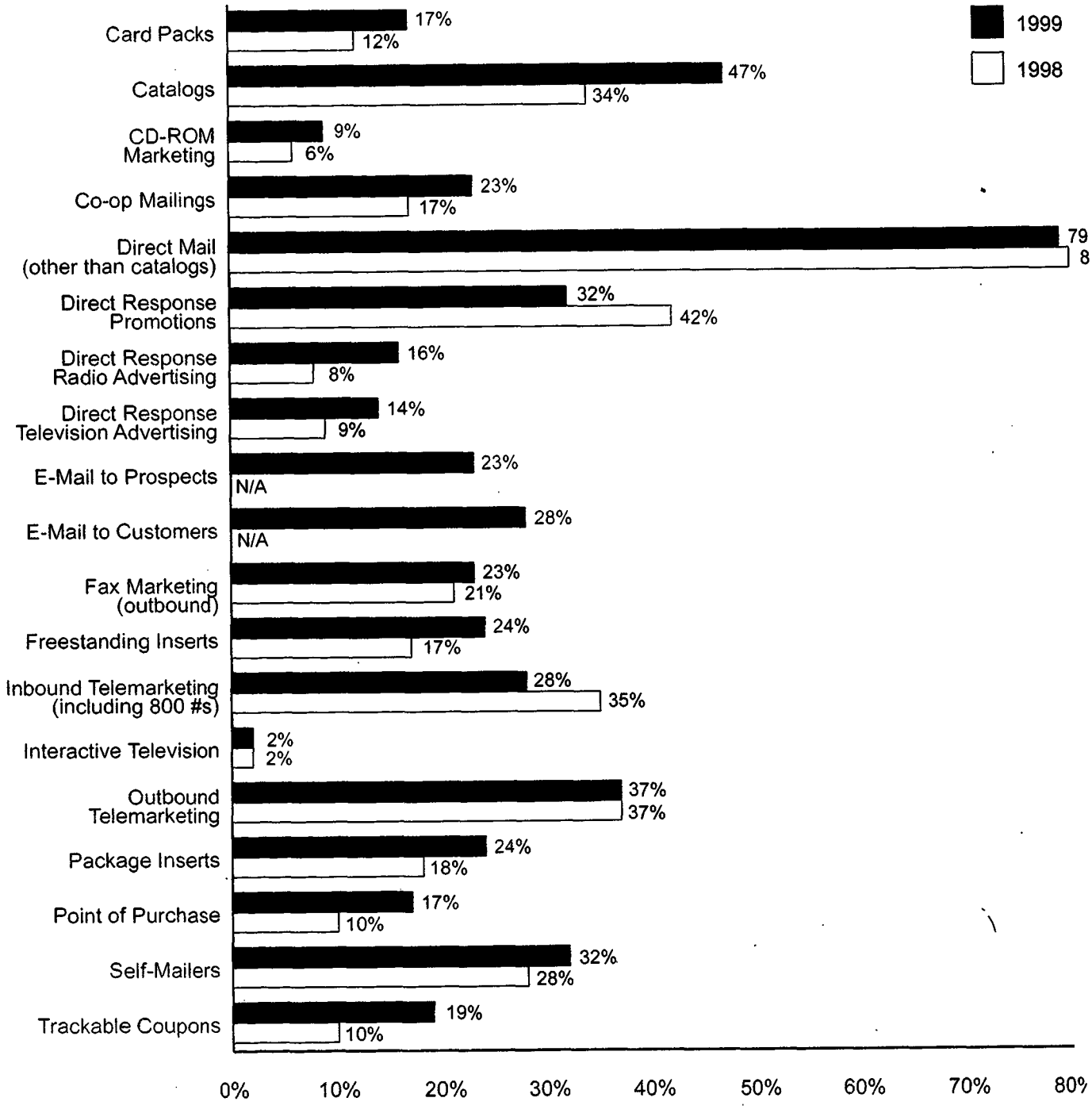
The biggest transaction was the June 1999 merger of DoubleClick and Abacus Direct, a deal that carried a value of $1.0 billion.

	Date	Acquired Company	Segment	Buyer	Value $MM
1	Jun 99	Abacus Direct	Database	DoubleClick	1,000
2	Apr 98	Metromail	Database	Great Universal Stores	910
3	Mar 98	AT&T American Transtech	Teleservice	Convergys Corporation	625
4	Sep 98	May & Speh	Computer Service	Acxiom Corporation	625
5	Sep 98	CKS Group	Web Agency	USWeb Corporation	540
6	Dec 98	Bronner Slosberg Humphrey	DM Agency	Hellman & Friedman	220
7	Jun 99	Donnelley Marketing	Database	InfoUSA	200
8	Jun 99	Intl. Data & Response	Teleservice	Telespectrum Worldwide	192
9	Apr 99	KnowledgeBase Marketing	Database	Young & Rubicam	175
10	Jul 98	ATC Communications	Teleservice	IQI Marketing Solutions	166
11	May 98	ITI Marketing Services	Teleservice	APAC TeleServices	149
12	Mar 98	Arnold Communications	DM Agency	Snyder Communications	120
13	Feb 98	SG2	Database	Experian Corporation	115
14	Aug 98	Clinical Communications	Specialty Agency	Snyder Communications	108
15	Jul 99	Grizzard Communications	DM Agency	Marketing Services Group	100

Source: Winterberry Group LLC, 1999.

DIRECT MARKETING METHODS USED BY MARKETERS

Direct mail (other than catalogs) is still the number one direct marketing method used by marketers.



Source: Primedia Intertec, copyright 1999.

EXHIBIT G

STATISTICAL FACT BOOK

2001

23rd edition

Direct Marketing Association

1120 Avenue of the Americas
New York, NY 10036-6700
212.768.7277

CHAPTER HIGHLIGHTS

- The salary range for an advertising agency account executive with 1 to 3 years' experience in 2000 was $34,900 -$43,500; for a copywriter with the same experience, the range was $43,500 - $52,000.
- Brann Worldwide is the number one Direct Response Advertising Agency based on 1999 direct response agency ranking by billings.
- In the past decade, direct mail's percentage of all advertising spending has grown 1.6%.
- At least 55% of respondents to Direct magazine's annual reader survey said their company's spending on Direct Marketing would go up in 2001.
- Internet/online advertising grew from $26.7 million in 1996 to $8.2 billion in 2000.
- Toll-free numbers (29%) and Internet addresses (24%) are the most often used direct response mechanisms.
- Television reigned as the medium of choice for companies wanting to reach Hispanic consumers.

BUSINESS EXPANSION PLANS BY SEGMENT

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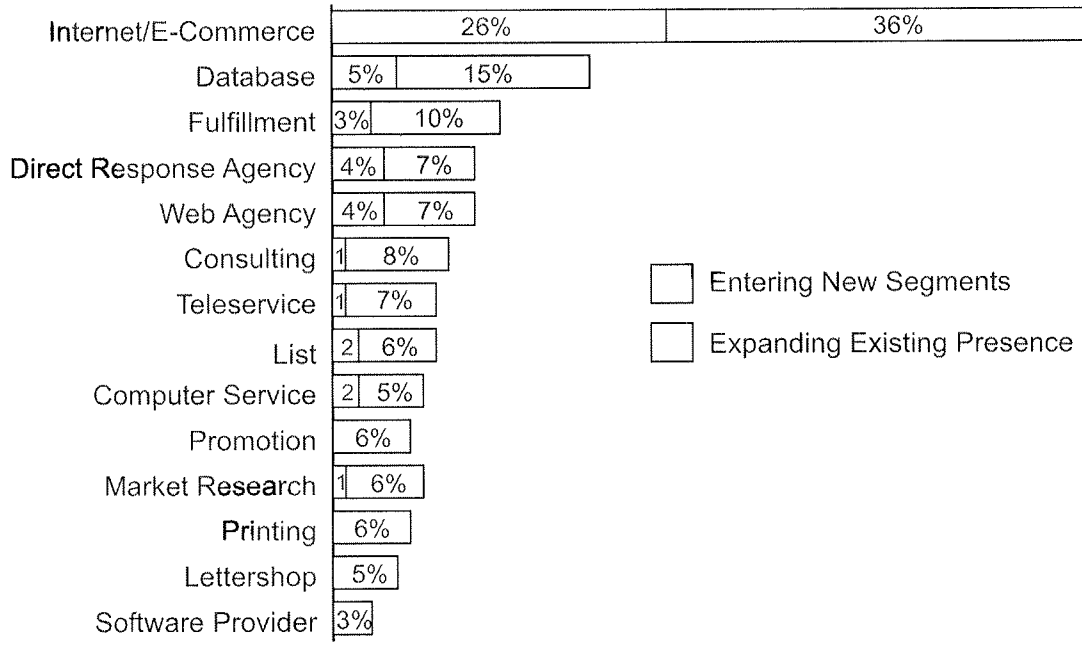

Source: Winterberry Group LLC, 1999.

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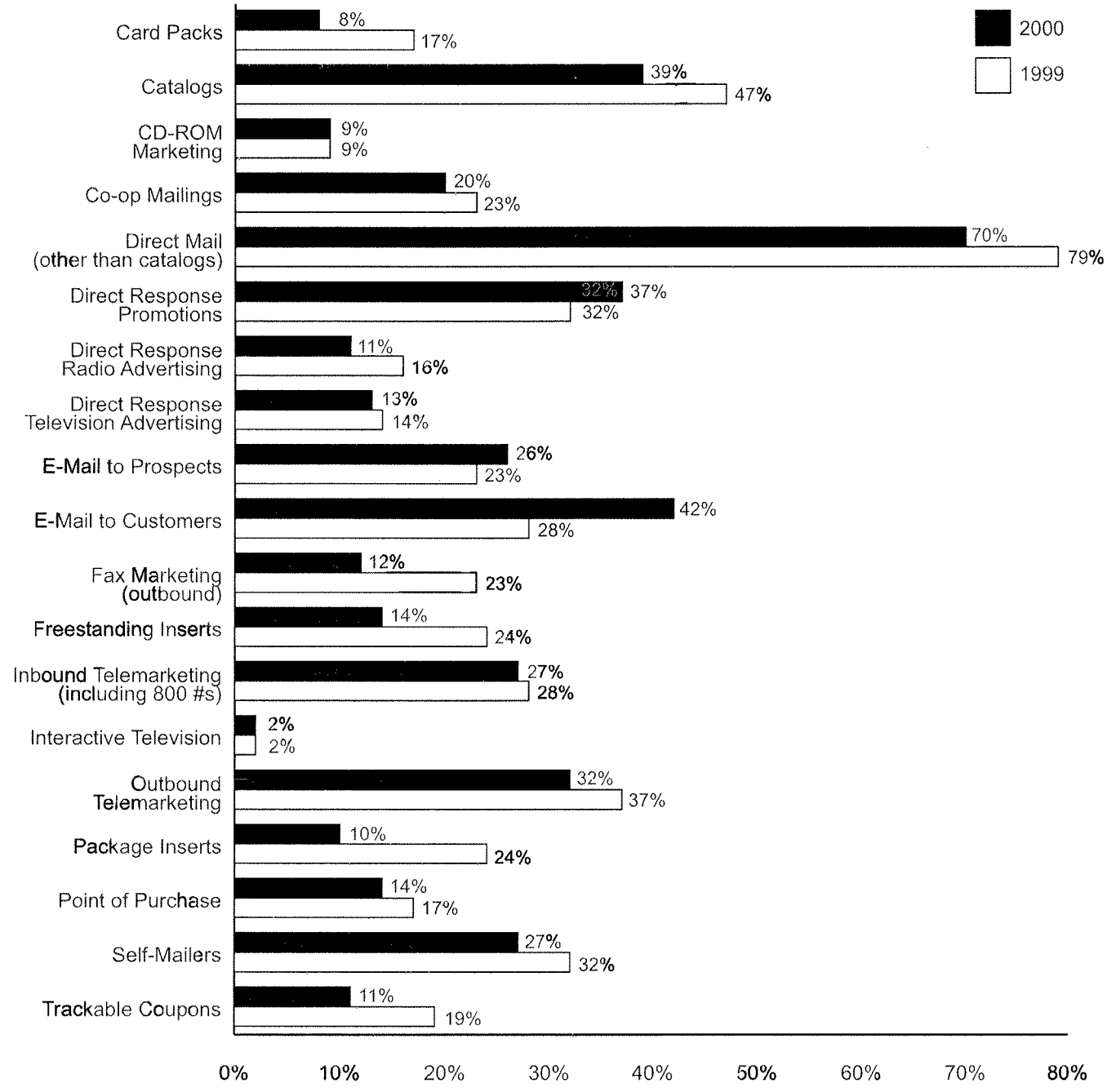


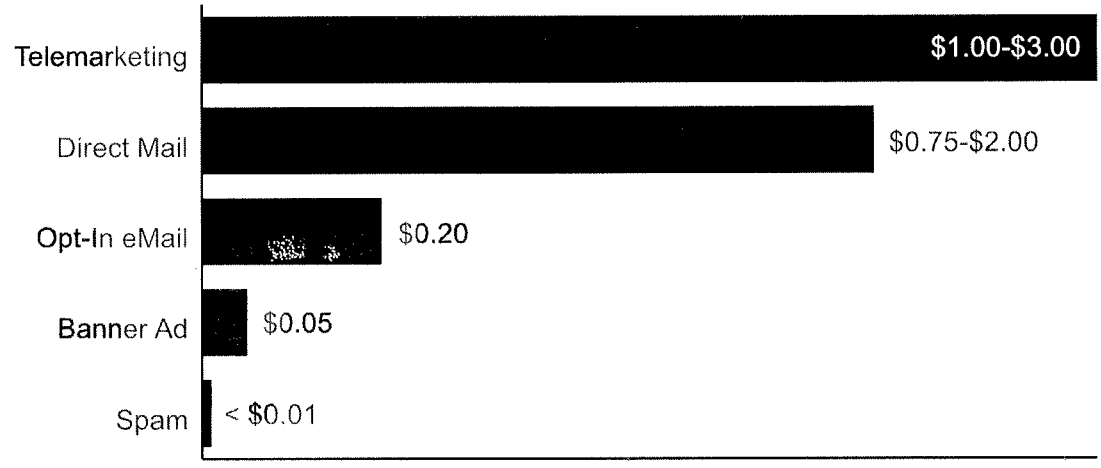
Source: Primedia Intertec, copyright 2000.

CHAPTER HIGHLIGHTS

- More than 50% of households claim they want to receive more or don't mind getting some advertising mail.
- 84% of respondents open direct mail because they recognize the company who is sending it.
- Adults aged 22–34 are most likely to respond to direct mail pieces.
- In 1999, mail pieces containing advertising or a request for a donation received a higher response than in 1998 if they were catalogs not in an envelope.
- Previous customers of an organization are much more likely to respond to direct mail offers.
- Direct mail pieces from the government sector are most likely to be read, followed by merchants (supermarkets, department stores, etc.) or social, charitable, or political organizations.
- The average consumer receives 20.01 pieces of mail per week.
- Most people still prefer to send confidential documents by regular mail than e-mail (88% versus 11%).
- October is the most popular month for consumer products/services mailings, followed by November.
- More than 60% of high income and high education households have personal computers; others seem to be much more comfortable with hardcopy mail.

OFFLINE & ONLINE DIRECT MARKETING COSTS: AVERAGE COST PER MESSAGE, 2000

E-mail to opt-in lists is more cost-effective than direct mail and telemarketing.



Source: eMarketer, 2001.

E-MAIL MARKETING SPENDING IN THE US: 1999-2003 (IN MILLIONS)

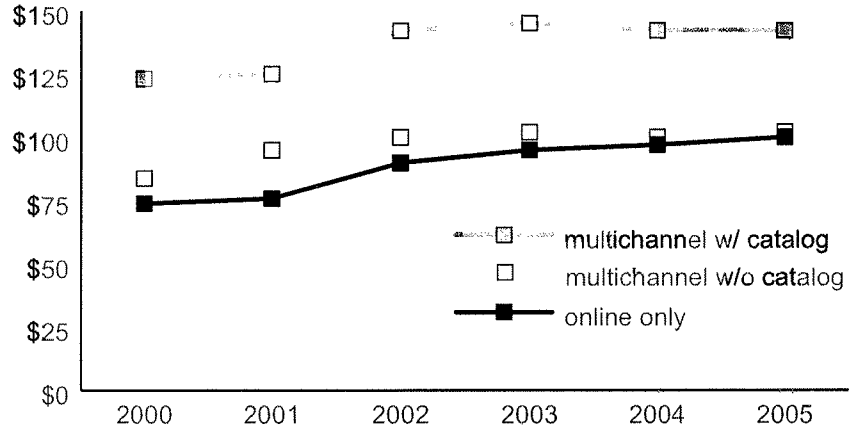
Total e-mail marketing spending in the U.S. in 2000 was just over $1 billion, including $496 million spent on e-mail ads. By year-end 2003, U.S. businesses (and other organizations) will spend almost $4.6 billion, including $2.2 billion on e-mail advertising expenditures.

	1999	2000	2001	2002	2003
eMail advertising	$179	$496	$927	$1,558	$2,199
Other e-mail marketing/products/services	$242	$589	$1,148	$1,707	$2,359
Total e-mail marketing spending	$422	$1,084	$2,074	$3,265	$4,558

Source: eMarketer, 2001.

U.S. AVERAGE ONLINE CUSTOMER ACQUISITION COSTS BY CHANNEL STRATEGY, 2000 - 2005

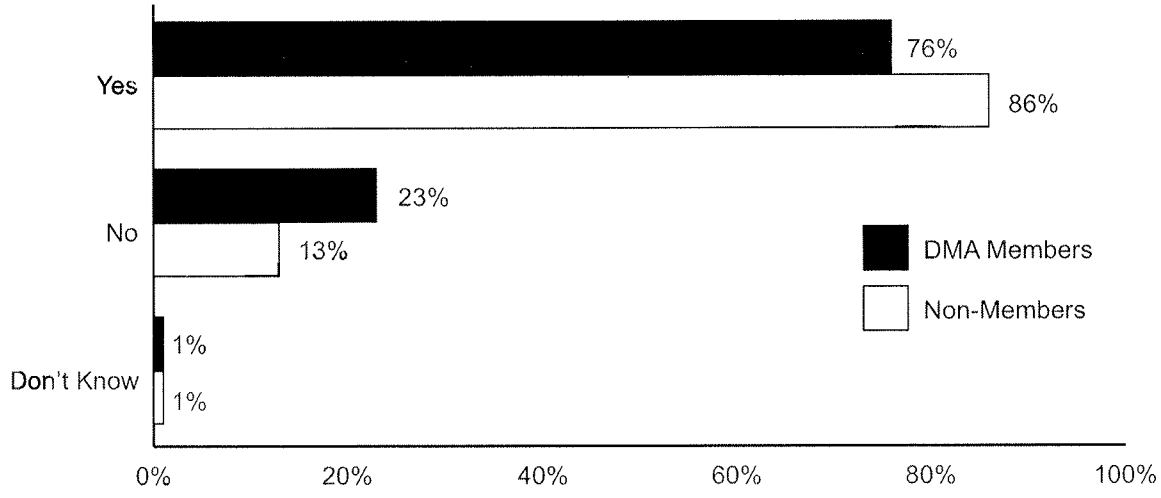
Overall, average online customer acquisition costs (CACs) will rise from $95 in 2000 to $122 in 2003, then level off to just under $120 in 2004 and 2005.



Source: IDC, February 2001.

WHETHER RESPONDENTS HAVE AN IN-HOUSE E-MAIL LIST

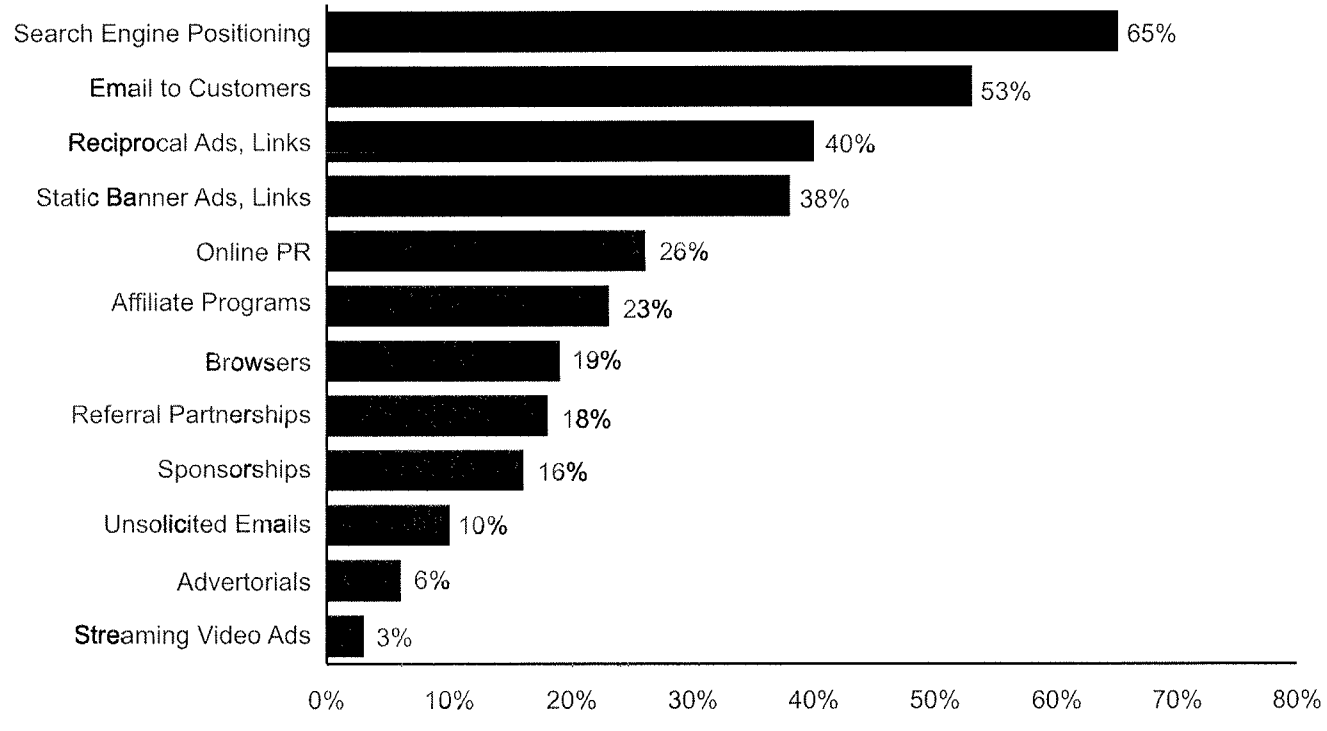
The majority of DMA member (76%) and non-member (86%) respondents have an in-house e-mail list.



Source: The DMA's State of the Interactive eCommerce Marketing Industry, 2000.

ONLINE PROMOTION METHODS CURRENTLY USED TO DRIVE TRAFFIC TO WEB SITE

Member respondents use search engine positioning (65%), e-mail to customers (53%), reciprocal ads/links (40%), and static banner ads (38%) to drive traffic to their Web site.



Source: The DMA's State of the Interactive eCommerce Marketing Industry, 2000.

TOTAL NUMBER OF MAIL PIECES (ALL CLASSES) ATTRIBUTED TO DIRECT MAIL 1977-2000

(POSTAL FISCAL YEAR = OCT 1 – SEPT 30)
(IN THOUSANDS)

The percentage of total mail volume attributed to direct mail has grown since 1977.

	Total # USPS Pieces	Total # Direct Mail Volume Pieces*	Percentage of Total Mail Volume Attributed to Direct Mail
Total 1977	92,257,000	34,247,163	37.1%
Total 1978	96,913,000	30,524,728	31.5%
Total 1979	99,827,000	32,590,461	32.6%
Total 1980	106,311,000	34,631,377	32.6%
Total 1981	110,130,000	38,207,266	34.7%
Total 1982	114,049,000	39,696,848	34.8%
Total 1983	119,381,000	43,677,504	36.6%
Total 1984	131,545,000	51,151,864	38.9%
Total 1985	140,098,000	55,567,258	40.0%
Total 1986	146,409,000	58,238,290	39.8%
Total 1987	153,931,000	62,694,702	40.7%
Total 1988	160,491,000	65,595,648	40.9%
Total 1989	161,603,000	58,454,416	36.2%
Total 1990	166,300,000	66,340,332	39.9%
Total 1991	165,850,000	66,404,601	40.0%
Total 1992	166,443,391	66,577,261	40.0%
Total 1993	171,219,994	69,715,897	40.7%
Total 1994	177,062,220	73,382,560	41.4%
Total 1995	180,733,705	75,194,773	41.6%
Total 1996	182,680,802	75,831,380	41.5%
Total 1997	190,888,060	81,329,049	42.6%
Total 1998	197,943,197	87,163,478	44.0%
Total 1999	201,576,282	89,637,850	44.4%
Total 2000	207,882,151	93,816,885	45.1%

* Note: The total number of direct mail volume pieces are determined from the following percentage approximations agreed upon by the USPS and The DMA: 95% of standard mail (A), 7.5% of first class, 85% of standard mail (B) bound printed matter, and 2% of international mail is direct mail.

Source: The DMA/USPS Revenue, Pieces and Weight by Classes of Mail and Special Services for fiscal years 1977-2000.

EXHIBIT H

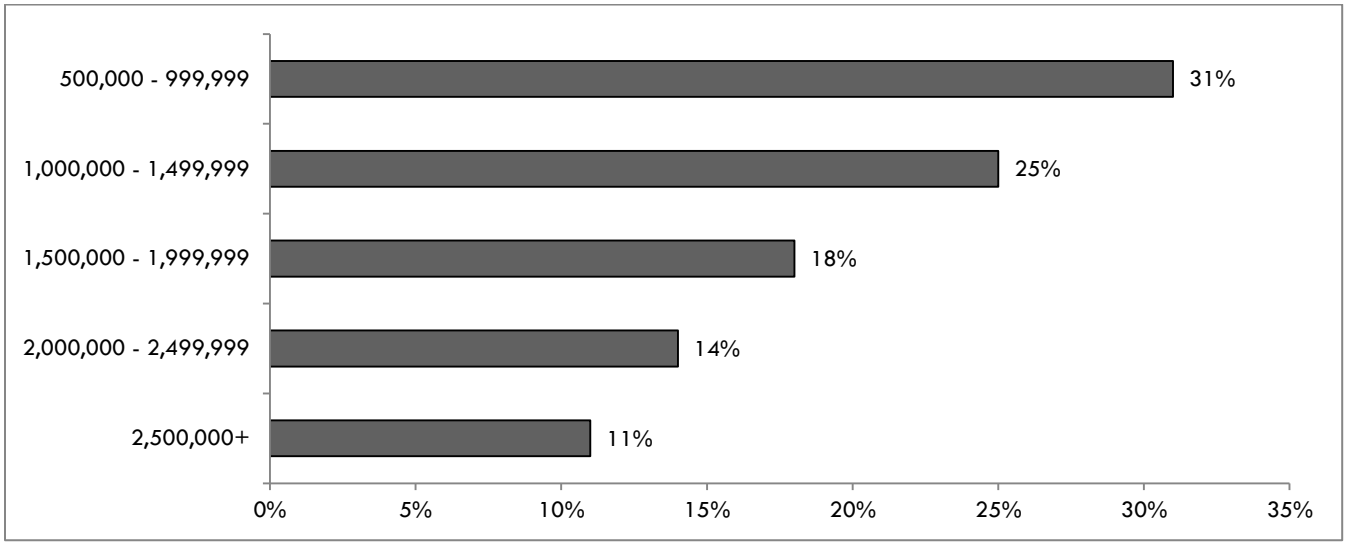
DMA Research

STATISTICAL FACT BOOK

2015

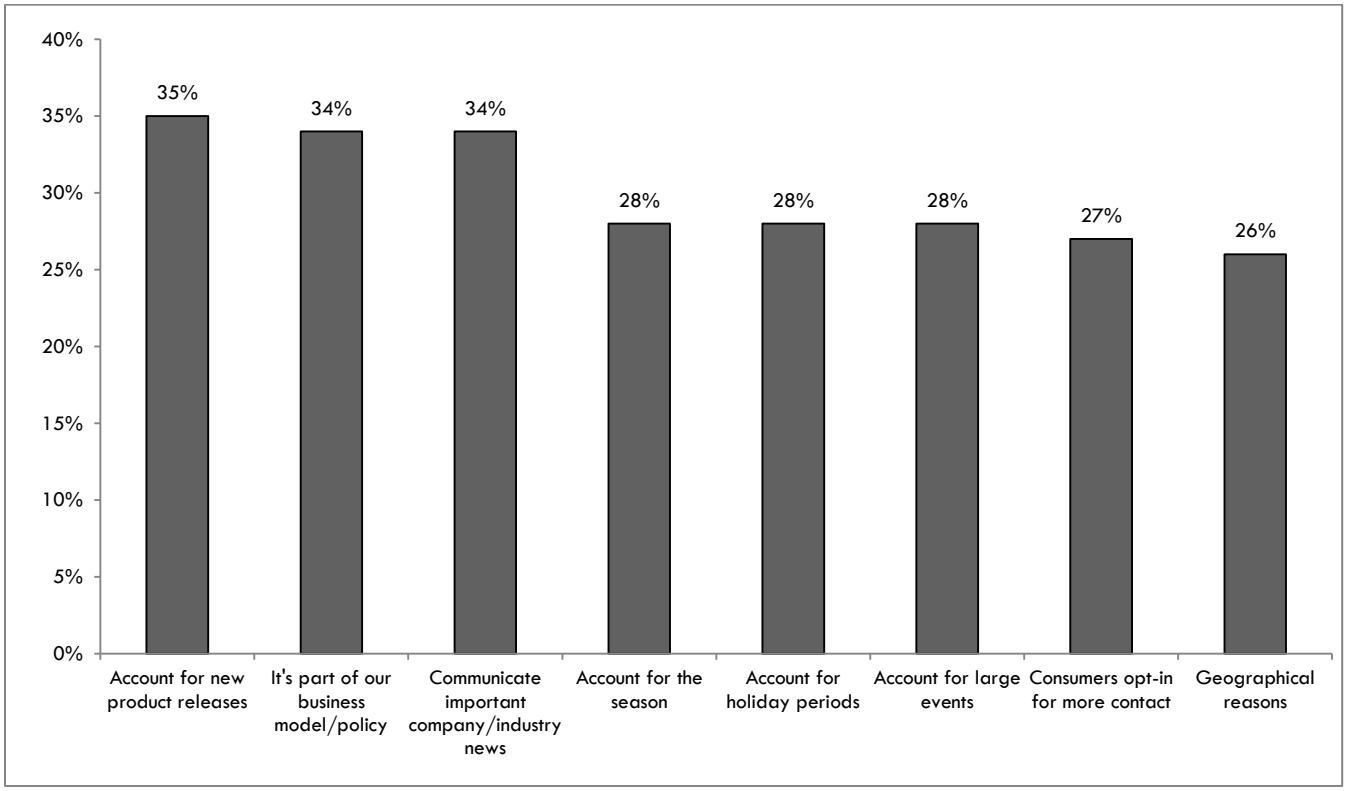
The Definitive Source for Marketing's Most Important Benchmarks

AMOUNT OF US EMAILS SENT PER MONTH AS PART OF MARKETING EFFORTS OR TRANSACTIONAL AND BUSINESS EMAIL



Source: Mailjet & Radius, Global Email Marketing Research Study, November 2014.

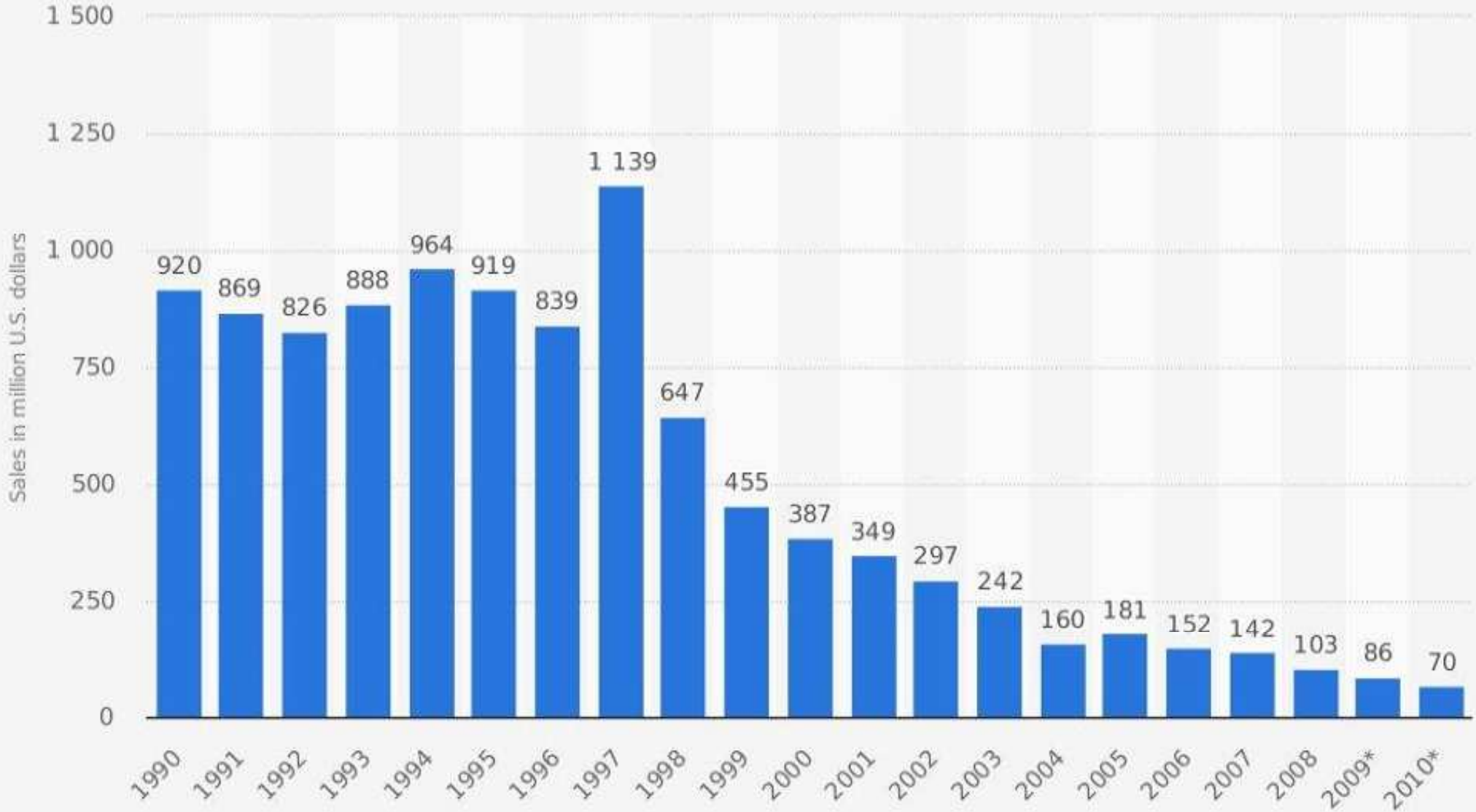
AMOUNT OF US EMAILS SENT PER MONTH AS PART OF MARKETING EFFORTS OR TRANSACTIONAL AND BUSINESS EMAIL



Source: Mailjet & Radius, Global Email Marketing Research Study, November 2014.

EXHIBIT I

Sales of fax machines in the United States from 1990 to 2010 (in million U.S. dollars)



Source
US Census Bureau

Additional Information:
United States; Consumer Technology Association; 1990 to 2008